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IX. Use of Way

A. Right to Use

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Research References

West's Key Number Digest

West's Key Number Digest, Highways 82, 167

West's Key Number Digest, Municipal Corporations 671

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IX. Use of Way

A. Right to Use

§ 144. Use of highways, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

Streets and highways are established and maintained primarily for purposes of travel by the public,[1] and incidental uses.[2]

Although the use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right,[3] it is subject to reasonable limitations[4] and regulations.[5] Thus, it has also been said that use of public highways is not an absolute right, but is a privilege that a person enjoys, subject to the control of the state in the valid exercise of its police power.[6]

Because bridges constitute a part of the highways,[7] they are subject to the same public easement of passage.[8]

Footnotes

1 Birmingham Ry., Light & Power Co. v. Smyer, 181 Ala. 121, 61 So. 354 (1913); Escobedo v. State Dept. of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950) (overruled on other grounds by, Rios v. Cozens, 7 Cal. 3d 792, 103 Cal. Rptr. 299, 499 P.2d 979 (1972)); Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926); City of Chicago v. Rhine, 363 Ill. 619, 2 N.E.2d 905, 105 A.L.R. 1045 (1936); Smith v. City of Jefferson, 161 Iowa 245, 142 N.W. 220 (1913); Terrell v. Tracy, 312 Ky. 631, 229 S.W.2d 433 (1950); Brenning v. Remington, 136 Neb. 883, 287 N.W. 776 (1939); Ex parte Duncan, 1937 OK 155, 179 Okla. 355, 65 P.2d 1015 (1937); City of Radford v. Calhoun, 165 Va. 24, 181 S.E. 345, 100 A.L.R. 1378 (1935); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915); Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N.W. 219, 33 A.L.R. 351 (1924).

2 §§ 166 to 194.

3 Campbell v. Superior Court In and For Maricopa County, 106 Ariz. 542, 479 P.2d 685 (1971); Escobedo v. State Dept. of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950) (overruled on other grounds by, Rios v. Cozens, 7 Cal. 3d 792, 103 Cal. Rptr. 299, 499 P.2d 979 (1972)); High Rock Lake Partners, LLC v. North Carolina Dept. of Transp., 366

N.C. 315, 735 S.E.2d 300 (2012) (common-law right); Duff v. State, 546 S.W.2d 283 (Tex. Crim. App. 1977); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930); Blumenthal v. City of Cheyenne, 64 Wyo. 75, 186 P.2d 556 (1947).

[4] § 146.

[5] §§ 152 to 165.

[6] State v. Kouba, 319 N.W.2d 161 (N.D. 1982).

[7] § 10.

[8] Gellasch v. Van Syckle, 267 Mich. 378, 255 N.W. 345 (1934).

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IX. Use of Way

A. Right to Use

§ 145. Right of all to use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

The public are entitled to a free passage along the highway.[1] The existence of a public highway creates a public easement of travel, which permits the general traveling public to use the highway at will.[2] All persons have an equal right to use highways for purposes of travel by proper means, and with due regard for the corresponding rights of others.[3] The right to use them is not restricted to the citizens of the municipality[4] or state.[5]

Footnotes

1 County of Boone v. Reynolds, 549 S.W.3d 24 (Mo. Ct. App. W.D. 2018), reh'g and/or transfer denied, (May 1, 2018) and transfer denied, (July 3, 2018).

2 Town of Ridgefield v. Eppoliti Realty Co., Inc., 71 Conn. App. 321, 801 A.2d 902 (2002).
The "public highway" created by operation of law along every section line is more than a right-of-way over which a public highway may be established; it is a passage or road that every citizen has a right to use. Douville v. Christensen, 2002 SD 33, 641 N.W.2d 651 (S.D. 2002).

3 State v. Mayo, 106 Me. 62, 75 A. 295 (1909); Omaha & Council Bluffs St. Ry. Co. v. City of Omaha, 114 Neb. 483, 208 N.W. 123 (1926); Dent v. Oregon City, 106 Or. 122, 211 P. 909 (1923); Bombard v. Newton, 94 Vt. 354, 111 A. 510, 11 A.L.R. 1402 (1920); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).
A traveler is privileged to enter that part of the land in the possession of another upon which there is a public highway, to the extent his or her presence there is in the reasonable use of the highway. Restatement Second, Torts § 192.

4 Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172 (1920); Wilmot v. City of Chicago, 328 Ill. 552, 160 N.E. 206, 62 A.L.R. 394 (1927); New York State Public Employees Federation, AFL-CIO v. City of Albany, 269 A.D.2d 707, 703 N.Y.S.2d 573 (3d Dep't 2000); Parker v. City of Silverton, 109 Or. 298, 220 P. 139, 31 A.L.R. 589 (1923); Norfolk & P. Traction Co. v. City of Norfolk, 115 Va. 169, 78 S.E. 545 (1912); Yarrow First Associates v. Town of Clyde Hill, 66 Wash. 2d 371, 403 P.2d 49 (1965).

The right to use of the highways rests with the whole people of the state. Augusta v. Kwortnik, 161 A.D.3d 1401, 78 N.Y.S.3d 726 (3d Dep't 2018).

[5] County Com'rs of Charles County v. Stevens, 299 Md. 203, 473 A.2d 12 (1984).

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IX. Use of Way

A. Right to Use

§ 146. Limits on right to use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

The right to use the highways and streets for purposes of travel is not absolute and unqualified.[1] An individual does not have the right to use highways permanently for private purposes.[2] The rights of the public and of abutting owners must each be exercised with due consideration for the other.[3]

Footnotes

1 Northern Indiana Transit, Inc. v. Burk, 228 Ind. 162, 89 N.E.2d 905, 17 A.L.R.2d 572 (1950); State v. Mayo, 106 Me. 62, 75 A. 295 (1909); Ex parte Smith, 441 S.W.2d 544 (Tex. Crim. App. 1969).
Residents do not have the right to fish from a public road or river bridge abutment where the road easement specifically provides that the easement would be used only for use as a public street or road. Kirby v. Town of Claremont, 243 Va. 484, 416 S.E.2d 695 (1992).
No one has the right to use public highways for risking self-destruction. Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377 (1969).
As to limitations or conditions imposed by a dedicator upon land used for a highway or street, see Am. Jur. 2d, Dedication § 8.

2 Silverman v. Usen, 128 Me. 349, 147 A. 421 (1929).

3 People ex rel. McCormick v. Western Cold Storage Co., 287 Ill. 612, 123 N.E. 43, 11 A.L.R. 437 (1919).

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IX. Use of Way

A. Right to Use

§ 147. Superior rights of public

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

The public right to the use of a street for travel is absolute and paramount,[1] and greater than that of an individual to occupy it for other purposes.[2] Streets and highways are primarily for the benefit of the traveling public, and only incidentally for the benefit of property owners along them.[3]

The rights of the owner of the underlying fee are always subordinate to those of the public, and may be diminished as the public needs increase.[4] When a highway is used for any public purpose not inconsistent with or prejudicial to its use for highway purposes, the mere disturbance of the rights of light, air, and access of abutting owners on such a highway by the imposition of a new use, consistent with its use as an open public street, must be tolerated by such owners.[5] An abutting owner's rights[6] must be exercised with due regard to the safety of the public,[7] and so as not to interfere unreasonably with its use of the way,[8] and so to inconvenience others as little as is reasonably practicable.[9]

On the other hand, although the public has a legitimate right to the use and enjoyment of a public roadway, that right must be exercised in a reasonable manner and with due regard for the right of the adjoining property owners to use and enjoy their property.[10]

Footnotes

1 Augusta v. Kwortnik, 161 A.D.3d 1401, 78 N.Y.S.3d 726 (3d Dep't 2018).

2 Pugh v. City of Des Moines, 176 Iowa 593, 156 N.W. 892 (1916); Etchison v. Frederick City, 123 Md. 283, 91 A. 161 (1914); Texas Co. v. Grant, 143 Tex. 145, 182 S.W.2d 996 (1944).

3 Concerned Community Involved Development, Inc. v. City of Houston, 209 S.W.3d 666 (Tex. App. Houston 14th Dist. 2006).
The right to use of the highways rests with the whole people of the state, not with the adjacent proprietors. Augusta v.

Kwortnik, 161 A.D.3d 1401, 78 N.Y.S.3d 726 (3d Dep't 2018).

4 Quigley v. Village of Hibbing, 268 Minn. 541, 129 N.W.2d 765, 20 A.L.R.3d 1353 (1964); Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955).

5 Augusta v. Kwortnik, 161 A.D.3d 1401, 78 N.Y.S.3d 726 (3d Dep't 2018).

6 §§ 130 to 141.

7 §§ 319 to 325.

8 Birmingham Ry., Light & Power Co. v. Smyer, 181 Ala. 121, 61 So. 354 (1913); Massey v. Worth, 39 Del. 211, 197 A. 673 (Super. Ct. 1938).

9 City of Lawrenceburg v. Lay, 149 Ky. 490, 149 S.W. 862 (1912).

10 West v. National Mines Corp., 168 W. Va. 578, 285 S.E.2d 670, 25 A.L.R.4th 1179 (1981).

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IX. Use of Way

A. Right to Use

§ 148. Manner of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

The public easement of passage over a highway or street includes every kind of travel and communication for the transportation of persons or property that is reasonable and proper.[1] The easement of the public in a highway is not limited to the particular methods of use in vogue when the easement was acquired, but includes all methods that are later developed,[2] which are assumed to have been contemplated.[3]

Footnotes

1 Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926); People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915); Hall v. Lea County Elec. Co-op., 1968-NMSC-040, 78 N.M. 792, 438 P.2d 632 (1968); Sumner County v. Interurban Transp. Co., 141 Tenn. 493, 213 S.W. 412, 5 A.L.R. 765 (1919); McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928).
Bicycles have a recognized place on the highways and are expressly authorized by statute to use most public ways. Opinion of the Justices to the Senate, 370 Mass. 895, 352 N.E.2d 197 (1976).
Horse-drawn carriages, horseback riders, cyclists, and pedestrians are equally entitled to the use of the highways with motor vehicles. Matson v. Dawson, 185 Neb. 686, 178 N.W.2d 588 (1970).
As to vehicular traffic regulation, generally, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 222 to 231.

2 Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913) (overruled on other grounds by, City of Orange Beach v. Benjamin, 821 So. 2d 193 (Ala. 2001)); McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928).

3 McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928).

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IX. Use of Way

A. Right to Use

§ 149. Remedies for unauthorized use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 671

Rights with respect to the use of highways may be protected by injunction[1] or enforced by mandamus.[2] Ordinarily, an unauthorized, unlawful, improper, or injurious use of a highway, which materially interferes with the enjoyment of the public easement, may be enjoined at the instance of the controlling public authority.[3] An injunction is also available to private individuals to prevent those acts, if they would cause those individuals special or peculiar injury.[4] However, a particular use of the highway will not be enjoined, unless it amounts to a substantial interference with the rights of others.[5]

Private individuals may also recover damages for any unauthorized or unlawful use that causes them special or peculiar injury.[6]

Where the right to occupy or use a street or highway for a particular purpose depends on a grant from a public authority, the propriety of that occupancy or use may be questioned by an information in the nature of a quo warranto.[7]

A court may take judicial notice of the fact that wires highly charged with electric energy stretched across a public street are dangerous.[8]

Footnotes

1 Teacher Bldg. Co. v. City of Las Vegas, 68 Nev. 307, 232 P.2d 119 (1951) (overruled in part on other grounds by, Probasco v. City of Reno, 85 Nev. 563, 459 P.2d 772 (1969)); Milwaukee Electric Railway & Light Co. v. City of Milwaukee, 95 Wis. 39, 69 N.W. 794 (1897).

2 Am. Jur. 2d, Mandamus §§ 211 to 218.

3 Incorporated Town of Ackley v. Central States Electric Co., 204 Iowa 1246, 214 N.W. 879, 54 A.L.R. 474 (1927); City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 173 Wis. 400, 180 N.W. 339, 13 A.L.R. 802 (1920),

modified on other grounds, 173 Wis. 400, 181 N.W. 821, 13 A.L.R. 802 (1921).

[4] Donovan v. Pennsylvania Co., 120 F. 215 (C.C.A. 7th Cir. 1903); Kibbie Telephone Co. v. Landphere, 151 Mich. 309, 115 N.W. 244 (1908); Teacher Bldg. Co. v. City of Las Vegas, 68 Nev. 307, 232 P.2d 119 (1951) (overruled in part on other grounds by, Probasco v. City of Reno, 85 Nev. 563, 459 P.2d 772 (1969)); Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A. 72 (1907); McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928); Motoramp Garage Co. v. City of Tacoma, 136 Wash. 589, 241 P. 16, 42 A.L.R. 886 (1925); City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 173 Wis. 400, 180 N.W. 339, 13 A.L.R. 802 (1920), modified on other grounds, 173 Wis. 400, 181 N.W. 821, 13 A.L.R. 802 (1921).
As to remedies for the prevention of unlawful obstructions or encroachments, see §§ 272 to 277.

[5] Baker v. Selma Street & S. Ry. Co., 135 Ala. 552, 33 So. 685 (1903); Chicago, L. S. & S. B. Ry. Co. v. Guilfoyle, 198 Ind. 9, 152 N.E. 167, 46 A.L.R. 1465 (1926); State v. Weber, 88 Kan. 175, 127 P. 536 (1912); Packard Motor Car Co. of Chicago v. Milwaukee Electric Ry. & Light Co., 179 Wis. 159, 190 N.W. 914, 30 A.L.R. 740 (1922).

[6] McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928).
As to remedies for the protection of proprietary rights in the way, see §§ 142, 143.
As to recovery of damages for injuries caused by defects or obstructions, see §§ 260 to 286.

[7] People ex rel. Pearce v. Commercial Tel. & Tel. Co., 277 Ill. 265, 115 N.E. 379 (1917).

[8] Incorporated Town of Ackley v. Central States Electric Co., 204 Iowa 1246, 214 N.W. 879, 54 A.L.R. 474 (1927).

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IX. Use of Way

A. Right to Use

§ 150. Right to travel on adjoining land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 82

Generally, if a public highway is out of repair to the extent that it is practically impassable, a traveler may lawfully go over the adjoining land without being guilty of trespass, but this right is limited by the necessity that creates it.[1] To warrant the exercise of this privilege, the obstruction must be of such a character as to render the road impracticable to use, and must arise from sudden and temporary causes.[2]

In passing over the adjoining land, the traveler may not do any unnecessary damage.[3] One court has held that if the adjoining land is enclosed by a fence, the traveler may break the fence to the extent necessary for passage.[4]

The Restatement Second, Torts provides that a traveler on a public highway who reasonably believes that the highway is impassable is privileged, when he or she reasonably believes it to be necessary to continue his or her journey, to enter, to a reasonable extent and in a reasonable manner, neighboring land in the possession of another, unless the condition of the highway has been caused by the tortious conduct of the traveler, or he or she has had a reasonable opportunity to avoid its use.[5] A traveler who exercises this privilege is subject to liability for resulting harm to any legally protected interest of the possessor in the land or connected with it, except where the condition of the highway is caused by the tortious conduct or contributory negligence of the possessor.[6]

Footnotes

1 Gulf Production Co. v. Gibson, 234 S.W. 906 (Tex. Civ. App. Fort Worth 1921).

2 Gulf Production Co. v. Gibson, 234 S.W. 906 (Tex. Civ. App. Fort Worth 1921).

3 Shriver v. Marion County Court, 66 W. Va. 685, 66 S.E. 1062 (1910).

[4] Shriver v. Marion County Court, 66 W. Va. 685, 66 S.E. 1062 (1910).

[5] Restatement Second, Torts § 195(1).

[6] Restatement Second, Torts § 195(2).

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IX. Use of Way

A. Right to Use

§ 151. Rural and urban road easements distinguished

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

Any distinction with regard to use between rural and more populous highways is regarded as tenuous and has been rejected in some jurisdictions.[1] However, in others, there is a generally recognized distinction between a highway easement in the country and a street easement in a municipality, with the urban servitude being more comprehensive than the rural.[2] It has also been recognized that as a village grows, the rights of the public in its streets are correspondingly broadened.[3]

Footnotes

1 Heyert v. Orange & Rockland Utilities, Inc., 17 N.Y.2d 352, 271 N.Y.S.2d 201, 218 N.E.2d 263 (1966); Hill Farm, Inc. v. Hill County, 436 S.W.2d 320 (Tex. 1969) (as to the extent of the easement and use for utilities).

2 Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955).
As to the uses of street easements, see §§ 214 to 222.

3 Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913) (overruled on other grounds by, City of Orange Beach v. Benjamin, 821 So. 2d 193 (Ala. 2001)); Franklin v. Board of Lights and Water Works, 212 Ga. 757, 95 S.E.2d 685 (1956).

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IX. Use of Way

B. Regulation and Control

Topic Summary | Correlation Table

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West's Key Number Digest, Highways 165, 166

West's Key Number Digest, Municipal Corporations 701.1, 703(1)

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IX. Use of Way

B. Regulation and Control

1. In General

§ 152. Regulation and control of highways, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

The management and control of highways and streets involve the exercise of legislative and administrative functions,[1] which courts will not assume.[2] The legislature, as representative of the state, has control and authority over the highways and streets within the borders of the state,[3] and may delegate that power to local governmental authorities.[4] The use of highways and streets may be limited, controlled, and regulated by the public authority in the exercise of the police power, whenever and to the extent necessary to provide for and promote the safety, peace, health, and general welfare,[5] calculated to secure to the general public the largest practical benefit from the enjoyment of the easement[6] and to provide for its safety while using it.[7]

Observation:

The state may limit the travel uses of highways to certain forms of use.[8] In other words, the state has the authority to regulate the time, mode, and circumstances under which parties shall assert, enjoy, or exercise their rights of highway use.[9]

The right of an abutting owner to use the highway in front of his or her premises is subject to the right of the public authority to regulate and control the highway for the benefit of the traveling public.[10] However, regulations that unduly or unreasonably curtail or restrict the rights of the abutting owner may not be sustained.[11]

Footnotes

[1] People v. Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377, 49 A.L.R.2d 449 (1955).

[2] Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543 (1932).

[3] § 160.

[4] §§ 153, 163.

[5] Clark v. Poor, 274 U.S. 554, 47 S. Ct. 702, 71 L. Ed. 1199 (1927); City and County of Denver v. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (1952); Rocking H Stables, Inc. v. Village of Norridge, 106 Ill. App. 2d 179, 245 N.E.2d 601 (1st Dist. 1969); Pugh v. City of Des Moines, 176 Iowa 593, 156 N.W. 892 (1916); Lamb v. State, 33 Kan. App. 2d 843, 109 P.3d 1265 (2005); McCarthy v. Inhabitants of Town of Leeds, 115 Me. 134, 98 A. 72 (1916); Rutledge Co-op. Ass'n v. Baughman, 153 Md. 297, 138 A. 29, 56 A.L.R. 1042 (1927); Harreld v. Mississippi State Highway Commission, 234 Miss. 1, 103 So. 2d 852 (1958); State ex rel. Audrain County v. City of Mexico, 355 Mo. 612, 197 S.W.2d 301 (1946); Haselton v. Interstate Stage Lines, 82 N.H. 327, 133 A. 451, 47 A.L.R. 218 (1926); Barbour v. Walker, 1927 OK 253, 126 Okla. 227, 259 P. 552, 56 A.L.R. 1049 (1927); State, By and Through State Highway Commission v. Burk, 200 Or. 211, 265 P.2d 783 (1954); State v. Campbell, 95 R.I. 370, 187 A.2d 543, 6 A.L.R.3d 499 (1963).

[6] City and County of Denver v. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (1952); People v. Linde, 341 Ill. 269, 173 N.E. 361, 72 A.L.R. 997 (1930); Smith v. State Highway Commission, 185 Kan. 445, 346 P.2d 259 (1959); Harreld v. Mississippi State Highway Commission, 234 Miss. 1, 103 So. 2d 852 (1958); Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N.W. 219, 33 A.L.R. 351 (1924).

[7] Snavely v. City of Huntsville, 785 So. 2d 1162 (Ala. Crim. App. 2000); State v. Mayo, 106 Me. 62, 75 A. 295 (1909); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).
As to regulation of vehicular traffic, generally, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 222 to 231.

[8] Sheehan v. New Hampshire Dept. of Resources and Economic Development, 164 N.H. 365, 55 A.3d 1031 (2012).

[9] Sheehan v. New Hampshire Dept. of Resources and Economic Development, 164 N.H. 365, 55 A.3d 1031 (2012).

[10] Smith v. State Highway Commission, 185 Kan. 445, 346 P.2d 259 (1959); Muse v. Mississippi State Highway Commission, 233 Miss. 694, 103 So. 2d 839 (1958); Jones Beach Boulevard Estate v. Moses, 268 N.Y. 362, 197 N.E. 313, 100 A.L.R. 487 (1935).

[11] Smith v. State Highway Commission, 185 Kan. 445, 346 P.2d 259 (1959).

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IX. Use of Way

B. Regulation and Control

1. In General

§ 153. Delegation of power to subordinate governments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

Control of streets and highways may primarily rest in the state,[1] but be delegated by the legislature[2] to local governments,[3] such as municipalities[4] or park commissioners.[5] Any such delegation may be revoked or changed at will.[6]

Footnotes

1 § 160.

2 BellSouth Telecommunications, Inc. v. City of Memphis, Tenn., 160 S.W.3d 901 (Tenn. Ct. App. 2004); City of Laredo v. Webb County, 220 S.W.3d 571 (Tex. App. Austin, 2007).

3 Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376, 121 A.L.R. 557 (1939); Commonwealth v. Kimball, 299 Mass. 353, 13 N.E.2d 18, 114 A.L.R. 1440 (1938); Bidlingmeyer v. City of Deer Lodge, 128 Mont. 292, 274 P.2d 821 (1954); Cabell v. City of Cottage Grove, 170 Or. 256, 130 P.2d 1013, 144 A.L.R. 286 (1942); Town of Leesburg v. Tavenner, 196 Va. 80, 82 S.E.2d 597 (1954).
A transportation statute established a system for delegating administrative and operational responsibilities for the public roads among the state, counties, and municipalities. Department of Transp. v. Carr, 254 Ga. App. 781, 564 S.E.2d 14 (2002).

4 § 163.

5 Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376, 121 A.L.R. 557 (1939).

6 Bidlingmeyer v. City of Deer Lodge, 128 Mont. 292, 274 P.2d 821 (1954); Cabell v. City of Cottage Grove, 170 Or. 256, 130 P.2d 1013, 144 A.L.R. 286 (1942); Leonard v. Talbert, 222 S.C. 79, 71 S.E.2d 603 (1952).

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IX. Use of Way

B. Regulation and Control

1. In General

§ 154. Delegation of power to administrative officers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

Legislative power to promulgate regulations relating to the use of streets may not be delegated to ministerial officers, to be exercised in their uncontrolled discretion,[1] but implementation of the details may be left to those officers.[2] Administrative officers may determine conditions under which a law may or may not apply, or alter regulations to meet peculiar local conditions, without violating restrictions on the delegation of legislative power.[3]

Footnotes

1 Automobile Club of Mo. v. City of St. Louis, 334 S.W.2d 355, 83 A.L.R.2d 612 (Mo. 1960) (no standard for delegation of power to set parking meter rates); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).

2 Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930); State v. Wetzel, 208 Wis. 603, 243 N.W. 768, 86 A.L.R. 274 (1932).

3 Sproles v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S.W.2d 691, 87 A.L.R. 534 (1932).

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IX. Use of Way

B. Regulation and Control

1. In General

§ 155. Surrender of powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

Government power to control and regulate the use of highways in the public interest may not be surrendered[1] or impaired by contract,[2] particularly where municipalities are involved,[3] since municipalities have a continuing duty to exercise legislative control over their streets.[4]

Municipal corporations do not have the power, by contract, ordinance, or bylaw, to yield their powers in this regard.[5]

Footnotes

1 Risser v. City of Little Rock, 225 Ark. 318, 281 S.W.2d 949 (1955) (overruled in part on other grounds by, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968)).

2 Missouri, K. & T. Ry. Co. v. State of Okl., 271 U.S. 303, 46 S. Ct. 517, 70 L. Ed. 957 (1926); Risser v. City of Little Rock, 225 Ark. 318, 281 S.W.2d 949 (1955) (overruled in part on other grounds by, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968)).

3 Risser v. City of Little Rock, 225 Ark. 318, 281 S.W.2d 949 (1955) (overruled in part on other grounds by, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968)); Perry v. City of Cumberland, 312 Ky. 375, 227 S.W.2d 411 (1950).

4 Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).

5 Risser v. City of Little Rock, 225 Ark. 318, 281 S.W.2d 949 (1955) (overruled in part on other grounds by, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968)); Wills v. City of Los Angeles, 209 Cal. 448, 287 P. 962, 69 A.L.R. 1044 (1930); Colorado & S. Ry. Co. v. City of Ft. Collins, 52 Colo. 281, 121 P. 747 (1912); Sundstrom v. Village of Oak Park, 374 Ill. 632, 30 N.E.2d 58, 131 A.L.R. 1465 (1940); Henderson Elevator Co. v. City of Henderson, 187 Ky. 453,

219 S.W. 809, 18 A.L.R. 983 (1920); World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N.W. 574, 40 A.L.R. 1313 (1925); Bessemer Imp. Co. v. City of Greensboro, 247 N.C. 549, 101 S.E.2d 336 (1958); Morris v. City of Salem, 179 Or. 666, 174 P.2d 192 (1946).

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IX. Use of Way

B. Regulation and Control

1. In General

§ 156. Validity of regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

In addition to the requirement that regulations governing the use of highways must be constitutional,[1] they must be reasonable[2] and impartial.[3] However, exact precision is not required.[4] Reasonableness is determined in view of the existing conditions.[5]

The absence of any provision for an appeal from the action of public authorities in promulgating regulations governing the use of highways does not necessarily render them invalid.[6] The construction in favor of the constitutionality of legislative enactments generally[7] applies.[8]

Footnotes

1 § 161.

2 State ex rel. Parker v. Frick, 150 Fla. 148, 7 So. 2d 152 (1942); Bennighof-Nolan Co. v. Adcock, 194 Ind. 33, 141 N.E. 782, 29 A.L.R. 1344 (1923); Brown v. Nichols, 93 Kan. 737, 145 P. 561 (1915); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930); Ticknor v. Seattle-Renton Stage Line, 139 Wash. 354, 247 P. 1, 47 A.L.R. 252 (1926).
Evidence that enforcement of an ordinance that effectively banned trucks weighing over 4½ tons from using certain city streets would force a rock quarry company to close was sufficient to establish that the ordinance was invalid as applied to the plaintiff. San Leandro Rock Co. v. City of San Leandro, 136 Cal. App. 3d 25, 185 Cal. Rptr. 829 (1st Dist. 1982).

3 § 157.

[4] South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938); Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S.W.2d 691, 87 A.L.R. 534 (1932).

[5] Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A.L.R. 1402 (1926).

[6] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S.W.2d 691, 87 A.L.R. 534 (1932).

[7] Am. Jur. 2d, Constitutional Law §§ 169 to 176.

[8] People v. Linde, 341 Ill. 269, 173 N.E. 361, 72 A.L.R. 997 (1930); Kenyon Hotel Co. v. Oregon Short Line R. Co., 62 Utah 364, 220 P. 382, 33 A.L.R. 343 (1923).

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IX. Use of Way

B. Regulation and Control

1. In General

§ 157. Validity of regulations—Discrimination; classification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

Regulations pertaining to the use of highways and streets must not unjustly discriminate between individuals or classes.[1] Reasonable classifications will be upheld.[2] A classification having a basis in practical convenience is constitutional, even though it may be lacking in purely theoretical or scientific uniformity.[3]

Footnotes

1 City and County of Denver v. Publix Cab Co., 135 Colo. 132, 308 P.2d 1016 (1957); State ex rel. Parker v. Frick, 150 Fla. 148, 7 So. 2d 152 (1942); State v. Luttrell, 159 Neb. 641, 68 N.W.2d 332 (1955); Frecker v. City of Dayton, 153 Ohio St. 14, 41 Ohio Op. 109, 90 N.E.2d 851 (1950); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).

2 Ater v. Armstrong, 961 F.2d 1224 (6th Cir. 1992) (statute prohibiting standing in roadway, but allowing solicitation of contributions); Ex parte Cardinal, 170 Cal. 519, 150 P. 348 (1915); City of Chicago v. Rhine, 363 Ill. 619, 2 N.E.2d 905, 105 A.L.R. 1045 (1936) (excepting daily newspapers from the operation of an ordinance prohibiting the sale of articles on streets); Rosa v. City of Portland, 86 Or. 438, 168 P. 936 (1917); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).

3 Continental Baking Co. v. Woodring, 286 U.S. 352, 52 S. Ct. 595, 76 L. Ed. 1155, 81 A.L.R. 1402 (1932).

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B. Regulation and Control

1. In General

§ 158. Construction of regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

The general principles governing the interpretation and construction of police regulations apply to regulations governing the use of highways.[1] Those regulations are to be given a reasonable construction.[2] The practical construction of regulations by administrative officers will be given consideration by the courts in determining their meaning and application.[3]

Footnotes

1 State ex rel. Parker v. Frick, 150 Fla. 148, 7 So. 2d 152 (1942).

2 Crosby v. Canino, 89 Colo. 434, 3 P.2d 792, 78 A.L.R. 1202 (1931).

3 State ex rel. McNerney v. Armstrong, 97 Neb. 343, 149 N.W. 786 (1914).

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IX. Use of Way

B. Regulation and Control

1. In General

§ 159. Bridges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bridges 29 to 32

The power of the states to regulate bridges, within their constitutional limits, is coextensive with their power to erect them, and may be delegated to local authorities or corporations.[1] However, a state agency exceeded its powers in entering into an agreement for private operation of a bridge, where state law provided that an existing bridge is to be operated and maintained as a toll-free facility.[2]

In some jurisdictions, a bridge company is a public utility, and its rates must be approved by the public utility commission,[3] but elsewhere a bridge and tunnel authority has the power to fix tolls.[4] A court may be empowered to review the reasonableness of a bridge toll when determining its legality.[5]

Observation:

Bridge tolls are user fees, rather than taxes.[6]

Footnotes

[1] Gellasch v. Van Syckle, 267 Mich. 378, 255 N.W. 345 (1934); State v. Vantage Bridge Co., 134 Wash. 568, 236 P.

280 (1925).
As to the general powers of the states over bridges, see §§ 37 to 40.

[2] State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp., 142 Wash. 2d 328, 12 P.3d 134 (2000).

[3] Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fla. 1978); Appeal of Cheshire Bridge Corp., 126 N.H. 425, 493 A.2d 1151 (1985).

[4] Carey Transp., Inc. v. Triborough Bridge and Tunnel Authority, 38 N.Y.2d 545, 381 N.Y.S.2d 811, 345 N.E.2d 281 (1976).

[5] Gargano v. Lee County Bd. of County Com'rs, 921 So. 2d 661 (Fla. 2d DCA 2006) (but not to order the refund of tolls).
Since using a toll bridge is a voluntary choice, the distinction between those who had to pay the toll and those who did not because they used alternative routes was not arbitrary, for equal protection purposes. Endsley v. City of Chicago, 319 Ill. App. 3d 1009, 253 Ill. Dec. 585, 745 N.E.2d 708 (1st Dist. 2001).

[6] Gargano v. Lee County Bd. of County Com'rs, 921 So. 2d 661 (Fla. 2d DCA 2006); Endsley v. City of Chicago, 319 Ill. App. 3d 1009, 253 Ill. Dec. 585, 745 N.E.2d 708 (1st Dist. 2001) (contractual in nature); Mass Transit Administration v. Baltimore County Revenue Authority, 267 Md. 687, 298 A.2d 413 (1973).

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IX. Use of Way

B. Regulation and Control

2. State Authority

§ 160. State authority to regulate use of highways, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

A highway's use is such as the state permits.[1] Under a state's common law, public highways are subject to state regulation[2] and control.[3] Generally the sole power to regulate[4] and the supreme control over[5] public highways is with the legislature, except as delegated to localities.[6] This rule applies, even though the fee is in the municipality.[7]

A state may delegate authority over roads in a forest to the state forestry department.[8]

Footnotes

1 Sheehan v. New Hampshire Dept. of Resources and Economic Development, 164 N.H. 365, 55 A.3d 1031 (2012).

2 Farmington City v. Lake, 2013 UT App 144, 304 P.3d 881 (Utah Ct. App. 2013).

3 Sheehan v. New Hampshire Dept. of Resources and Economic Development, 164 N.H. 365, 55 A.3d 1031 (2012).

4 Avella v. City of New York, 29 N.Y.3d 425, 58 N.Y.S.3d 236, 80 N.E.3d 982 (2017).

5 Cline v. Dunlora South, LLC, 284 Va. 102, 726 S.E.2d 14 (2012).

6 § 153.

7 Wilmot v. City of Chicago, 328 Ill. 552, 160 N.E. 206, 62 A.L.R. 394 (1927); City of New York v. Rice, 198 N.Y. 124, 91 N.E. 283 (1910); Leonard v. Talbert, 222 S.C. 79, 71 S.E.2d 603 (1952).

8 Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 762 A.2d 1219 (2000).

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IX. Use of Way

B. Regulation and Control

2. State Authority

§ 161. Limits on state's power

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

A state's power to regulate the use of highways is subject to limits.[1] A state may not impose conditions on public use of a highway if those conditions are forbidden by the state constitution.[2] A state may not so limit use that the character of the way as a highway is entirely divested, or that the way is limited to a use that is repugnant to that character[3] or that infringes on private property rights.[4]

Footnotes

1 Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543 (1932).

2 Sheehan v. New Hampshire Dept. of Resources and Economic Development, 164 N.H. 365, 55 A.3d 1031 (2012). Permitting land condemned for a highway to be devoted to private use violates a constitutional provision against the taking of private property for private use. Reed v. City of Seattle, 124 Wash. 185, 213 P. 923, 29 A.L.R. 446 (1923).

3 Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543 (1932).

4 Klaber v. Lakenan, 64 F.2d 86, 90 A.L.R. 783 (C.C.A. 8th Cir. 1933); Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 P. 237 (1910); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543 (1932); Lewis v. Pingree Nat. Bank, 47 Utah 35, 151 P. 558 (1915); Davis v. Spragg, 72 W. Va. 672, 79 S.E. 652 (1913).

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B. Regulation and Control

2. State Authority

§ 162. Jurisdiction between state and federal government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

The fact that the federal government has aided in the construction of state highways does not detract from a state's power to regulate them.[1] Nor will an Act of Congress establishing a national park be construed to curtail the state's jurisdiction over highways within the limits of the park.[2]

Footnotes

1 Morris v. Duby, 274 U.S. 135, 47 S. Ct. 548, 71 L. Ed. 966 (1927).

2 State of Colorado v. Toll, 268 U.S. 228, 45 S. Ct. 505, 69 L. Ed. 927 (1925).

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IX. Use of Way

B. Regulation and Control

3. Local Authority

§ 163. Local authority over use of highways, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

West's Key Number Digest, Municipal Corporations 701.1, 703(1)

Frequently, the legislature gives municipal corporations exclusive control over all the streets, alleys, and other public ways within their borders.[1] The power of a municipality to regulate its streets is a continuing one.[2]

Municipalities may regulate the use of their roadways,[3] for the protection of public welfare with regard to their proper use,[4] provided that the regulation does not constitute a denial of access,[5] devote the streets to uses other than those for which they were acquired,[6] nor abridge the constitutional rights of individuals.[7] For instance, a city may regulate pedestrian traffic,[8] or may have the authority to open a road for use only by pedestrians and bicyclists.[9] Likewise, a village has the authority to make reasonable regulations concerning traffic on roads within its corporate limits.[10]

A court does not have the authority to substitute its judgment and discretion for that of city officials on such matters as how to direct pedestrian traffic on public streets.[11]

Footnotes

1 Splinter v. City of Nampa, 70 Idaho 287, 215 P.2d 999, 17 A.L.R.2d 665 (1950); People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915); World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N.W. 574, 40 A.L.R. 1313 (1925); Ray v. City of Huntington, 81 W. Va. 607, 95 S.E. 23 (1918).
As to delegation to localities, see § 153.

2 Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).

3 Sebastian v. Georgetown, 146 Ohio App. 3d 227, 765 N.E.2d 925 (12th Dist. Brown County 2001); Jordan v. Landry's

Seafood Restaurant, Inc., 89 S.W.3d 737 (Tex. App. Houston 1st Dist. 2002).

[4] Jordan v. Landry's Seafood Restaurant, Inc., 89 S.W.3d 737 (Tex. App. Houston 1st Dist. 2002).

[5] Harlingen Irrigation Dist. Cameron County No. 1 v. Caprock Communications Corp., 49 S.W.3d 520 (Tex. App. Corpus Christi 2001).

[6] Lacey v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542 (1909); State v. Burkett, 119 Md. 609, 87 A. 514 (1913); Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).

[7] Florida State Conference of NAACP Branches v. City of Daytona Beach, Fla., 54 F. Supp. 2d 1283 (M.D. Fla. 1999) (traffic management plan, involving closing bridges to vehicular traffic during a black college reunion event, violated equal protection, since the plan was not used during other events involving large crowds).

[8] State v. O'Daniels, 911 So. 2d 247 (Fla. 3d DCA 2005).

[9] Christensen v. City of Pocatello, 142 Idaho 132, 124 P.3d 1008 (2005).

[10] Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust, 2009 WL 824727 (Mo. Ct. App. S.D. 2009), transferred to Mo. S. Ct., 304 S.W.3d 112 (Mo. 2010).

[11] City of Atlanta v. Sig Samuels Laundry and Dry Cleaning, 282 Ga. 586, 652 S.E.2d 533 (2007).

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IX. Use of Way

B. Regulation and Control

3. Local Authority

§ 164. Jurisdiction between counties and municipalities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

West's Key Number Digest, Municipal Corporations 701.1

County authorities do not have the power to control municipal streets, except where a statute so provides.[1] Where control is vested in the municipal authorities, the municipality's power over its streets is exclusive.[2] The highways in territory annexed by a municipality become streets and subject to the control of the municipal authorities.[3] The fact that a highway is constructed through a municipality by county authorities does not necessarily divest the municipal authorities of jurisdiction.[4]

Observation:

In a jurisdiction where both townships and county road commissions have constitutional authority to exercise reasonable control of highways, neither road commission has exclusive control.[5]

Footnotes

[1] Harbor Land Co. v. Village of Fairport, 7 Ohio Op. 405, 23 Ohio L. Abs. 44, 49 N.E.2d 194 (Ct. App. 7th Dist. Lake County 1936); Leonard v. Talbert, 222 S.C. 79, 71 S.E.2d 603 (1952).

[2] Harbor Land Co. v. Village of Fairport, 7 Ohio Op. 405, 23 Ohio L. Abs. 44, 49 N.E.2d 194 (Ct. App. 7th Dist. Lake County 1936); Martin v. Saye, 147 S.C. 433, 145 S.E. 186 (1928); Board of Com'rs of Spink County v. Chicago, M. & St. P. Ry. Co., 28 S.D. 44, 132 N.W. 675 (1911); Vizzaro v. King County, 130 Wash. 398, 227 P. 497 (1924).

[3] Gernert v. City of Louisville, 155 Ky. 589, 159 S.W. 1163 (1913); Harbor Land Co. v. Village of Fairport, 7 Ohio Op. 405, 23 Ohio L. Abs. 44, 49 N.E.2d 194 (Ct. App. 7th Dist. Lake County 1936); Ambrister v. City of Norman, 1959 OK 172, 344 P.2d 665 (Okla. 1959); Board of Com'rs of Spink County v. Chicago, M. & St. P. Ry. Co., 28 S.D. 44, 132 N.W. 675 (1911); City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695, 154 A.L.R. 1434 (1944).

[4] Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923).

[5] Oshtemo Charter Tp. v. Kalamazoo County Road Com'n, 302 Mich. App. 574, 841 N.W.2d 135 (2013).

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3. Local Authority

§ 165. Jurisdiction between local authorities and the state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 165, 166

West's Key Number Digest, Municipal Corporations 701.1

Usually, the general administrative supervision over a road or street forming a link in the state highway system rests with the state, rather than with the local government authority.[1] Under most constitutional and statutory provisions, the power to designate certain streets or roads as links in a state highway is vested exclusively in the state or its authorities,[2] but under other provisions, this power is exercised jointly with the local authorities.[3]

A state legislature may have the power to enact laws that authorize the use of city streets and rights-of-way without permission from the city.[4] On the other hand, a statute vesting in a state highway commission the power to control and regulate the use of streets forming a part of the state highway system did not confer on the commission the exclusive power to order the removal of utilities on the expiration of the franchise under which they were installed, and a city may institute quo warranto proceedings to oust the utility from its streets.[5]

Footnotes

1 Automatic Signal Advertising Co. v. Babcock, 166 Minn. 416, 208 N.W. 132 (1926); Hill v. Barbour County Court, 117 W. Va. 288, 185 S.E. 227 (1936).
That portion of a town ordinance that purported to regulate traffic over a state-owned and maintained route was beyond the town's power. Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 7, 390 N.Y.S.2d 827, 359 N.E.2d 337 (1976).

2 State ex rel. State Highway Commission v. District Court of First Judicial Dist. in and for Lewis and Clark County, 105 Mont. 44, 69 P.2d 112 (1937).

[3] State v. Morton, 128 Kan. 125, 276 P. 62 (1929).

[4] Metropolitan Government of Nashville and Davidson County, Tenn. v. BellSouth Telecommunications, Inc., 502 F. Supp. 2d 747 (M.D. Tenn. 2007).
A state agency's statutory authority to construct a light rail train project in a metropolitan area allowed it to exercise police powers over both trunk highways and city streets. Northern States Power Co. v. Federal Transit Admin., 358 F.3d 1050 (8th Cir. 2004) (applying Minnesota statute).

[5] State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607, 106 A.L.R. 1169 (1936).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

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West's Key Number Digest

West's Key Number Digest, Estoppel 62

West's Key Number Digest, Highways 88, 167
West's Key Number Digest, Municipal Corporations 679.1, 680(1) to 682(4), 683(1), 684 to 687, 689, 690

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

1. In General

§ 166. Special, permissive, and incidental uses of highways, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 88, 167

Where the fee of a highway has been transferred to the public, it may use the highway for any public purpose that is consistent with and not prejudicial to its use for highway purposes.[1] Public road easements, unless otherwise restricted, include secondary rights,[2] but the general rule is that only such uses as appertain directly or indirectly to the right of passage and tend to preserve or make the exercise of that right easier may be imposed on the easement.[3] Other uses constitute an additional burden or servitude for which the abutting owners are entitled to compensation.[4]

Footnotes

1 Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543 (1932).

2 Box L Corp. v. Teton County ex rel. Board of County Commissioners of Teton County, 2004 WY 75, 92 P.3d 811 (Wyo. 2004).

3 Smith v. City of Jefferson, 161 Iowa 245, 142 N.W. 220 (1913); Kentucky Utilities Co. v. Woodrum's Adm'r, 224 Ky. 33, 5 S.W.2d 283, 57 A.L.R. 1054 (1928); Thompson v. Orange & Rockland Electric Co., 254 N.Y. 366, 173 N.E. 224 (1930); State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

4 Am. Jur. 2d, Eminent Domain §§ 159 to 165.

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C. Special, Permissive, and Incidental Uses

1. In General

§ 167. Power to authorize

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 88, 167

West's Key Number Digest, Municipal Corporations 680(1)

No person may acquire a right to make a special or exceptional use of a public highway not common to all the citizens of the state, or not reserved in the instrument of dedication, except by a legislative grant.[1] The power to authorize the use of highways for a special purpose or in a special manner[2] is vested in the legislature, and may be exercised directly or delegated to municipalities or other subordinate governmental agencies.[3] A municipality's authority to grant or withhold consent to a utility to use its highways, streets, or alleys for the placement of facilities may also be derived from a state constitution.[4]

The public are entitled not only to a free passage along the highway but to a free passage along any portion of it not in the actual use of some other traveler, and so it necessarily follows that there can be no rightful permanent use of the way for private purposes.[5] However, a city may allow a private entity to use public rights-of-way, so long as the private use is consistent with the public's use.[6] The right to make a particular use of a highway, which would otherwise be unlawful or improper, may not be conferred by the consent or petition of abutting owners or citizens.[7]

Footnotes

1 Edmonds v. Baltimore & P.R. Co., 114 U.S. 453, 5 S. Ct. 1098, 29 L. Ed. 216 (1885); State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607 (1932); People ex rel. Central Hudson Gas & Electric Co. v. State Tax Commission, 247 N.Y. 281, 160 N.E. 371, 57 A.L.R. 374 (1928); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).

2 § 166.

3 Russell v. Sebastian, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914); Crawford Electric Co. v. Knox County Power

Co., 110 Me. 285, 86 A. 119 (1913); State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607 (1932); Alt v. State, 88 Neb. 259, 129 N.W. 432 (1911); West Tex. Utilities Co. v. City of Baird, 286 S.W.2d 185 (Tex. Civ. App. Eastland 1956), writ refused n.r.e.; State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

4 City of Lansing v. State, 275 Mich. App. 423, 737 N.W.2d 818 (2007) (holding that the constitutional provision is not self-executing, but a city must adopt an ordinance or resolution implementing it).

5 County of Boone v. Reynolds, 549 S.W.3d 24 (Mo. Ct. App. W.D. 2018), reh'g and/or transfer denied, (May 1, 2018) and transfer denied, (July 3, 2018).

6 Arkansas Oklahoma Gas Corp. v. City of Van Buren, 85 Ark. App. 157, 148 S.W.3d 282 (2004).

7 McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

1. In General

§ 168. Power to authorize—Limits on power delegated to municipalities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 679.1, 680(1), 680(8)

A municipal grant or license having the effect of diverting the streets from a public to a private use or of unreasonably appropriating them to a public use other than that of ordinary travel by pedestrians and vehicles is ultra vires,[1] absent a statute expressly permitting the municipality's action.[2]

A state legislature may have the authority to limit the manner and circumstances under which a city may grant or withhold consent to a utility to use its streets for the placement of facilities.[3] Statutes of this type have been upheld against various challenges under state constitutions.[4]

Where the municipality does not own the title to its streets, it may not use them or authorize their use for anything other than street purposes.[5] Any incidental use to which a highway easement is subjected that constitutes an unreasonable encroachment on their interest entitles the abutting owners to compensation, even though the use is authorized by the public authority.[6]

Footnotes

1 Sanders v. City of Daytona Beach, 95 Fla. 279, 116 So. 23 (1928); City of Stillwater v. Lovell, 1932 OK 661, 159 Okla. 214, 15 P.2d 12 (1932); Reed v. City of Seattle, 124 Wash. 185, 213 P. 923, 29 A.L.R. 446 (1923).
A city holds streets in trust for the public and does not have the power to grant an easement for private use. Jamison v. City of Zion, 359 Ill. App. 3d 268, 295 Ill. Dec. 918, 834 N.E.2d 499 (2d Dist. 2005).

2 Infanger v. City of Salmon, 137 Idaho 45, 44 P.3d 1100 (2002); Moore's Ferry Development Corp. v. City of Hickory, 166 N.C. App. 441, 601 S.E.2d 900 (2004) (further holding that an agreement between a city and a homeowners' association allowing the association to erect an information center on a public right-of-way did not create an "easement" such that it was authorized by a statute allowing a city to grant easements in streets, where the city and

association clearly labeled the agreement a license, and it was revocable by the city for any reason on 30 days' notice; also, the center was not an "appliance" or a "fixture" authorized by a statute allowing a city to license the placement of appliances or fixtures on public streets, since the structure was not an appliance in that it was not a device or instrument operated by electricity, and the presumption that the structure was a fixture did not arise, as the association was not the owner of the land).

A city's proposal to utilize the right-of-way of a demolished freeway by leasing it to a developer for construction of low income housing did not violate the terms of the state's grant of that right-of-way, which provided that the city shall utilize the right-of-way or the proceeds from sales of it for the sole purpose of constructing an alternate system of local streets, where, although the city did not use the right-of-way parcels as the actual site for the alternate streets project, it adopted a resolution stating that the proceeds from their disposition would be applied to pay for that project, which was sufficient compliance with the grant. Citizens for Better Streets v. Board of Supervisors, 117 Cal. App. 4th 1, 11 Cal. Rptr. 3d 349 (1st Dist. 2004).

[3] City of Lansing v. State, 275 Mich. App. 423, 737 N.W.2d 818 (2007).

[4] XO Missouri, Inc. v. City of Maryland Heights, 256 F. Supp. 2d 976 (E.D. Mo. 2003), aff'd, 362 F.3d 1023 (8th Cir. 2004); City of Lansing v. State, 275 Mich. App. 423, 737 N.W.2d 818 (2007).

As to First Amendment concerns with regard to use of public streets, see Am. Jur. 2d, Constitutional Law § 547.

[5] City of New York v. Rice, 198 N.Y. 124, 91 N.E. 283 (1910); Butler v. F.R. Penn Tobacco Co., 152 N.C. 416, 68 S.E. 12 (1910); Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573, 76 A.L.R.2d 888 (1959); Reed v. City of Seattle, 124 Wash. 185, 213 P. 923, 29 A.L.R. 446 (1923).

[6] State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

As to additional or special uses of highways and streets as entitling abutting owners to compensation, generally, see Am. Jur. 2d, Eminent Domain §§ 159 to 165.

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C. Special, Permissive, and Incidental Uses

1. In General

§ 169. Power to authorize—Exclusive privileges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 686

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Power of municipal corporation to limit exclusive use of designated lanes or streets to buses and taxicabs, 43 A.L.R.3d 1394

Municipality's power to permit private owner to construct building or structure overhanging or crossing the air space above public street or sidewalk, 76 A.L.R.2d 896

Where there is not a constitutional provision precluding it, a state may make an exclusive grant of a right to make a special use of the highways and streets.[1] Generally, any municipal power to grant an exclusive privilege must be expressly conferred[2] by municipal charters or general laws under which municipalities are incorporated.[3] Some cities are not authorized to grant exclusive franchises to use the streets, where this power is not included in the home rule powers and the legislature had not granted the city specific authority to grant them.[4] The extent to which streets may be used by more than one public service company may be defined or limited by provisions of statutes or ordinances.[5]

Footnotes

1 Stein v. Bienville Water-Supply Co., 141 U.S. 67, 11 S. Ct. 892, 35 L. Ed. 622 (1891).

2 Water, Light & Gas Co. of Hutchinson, Kan. v. City of Hutchinson, 207 U.S. 385, 28 S. Ct. 135, 52 L. Ed. 257 (1907).

[3] Crawford Electric Co. v. Knox County Power Co., 110 Me. 285, 86 A. 119 (1913); City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N.W. 588 (1908).

[4] Duck Tours Seafari, Inc. v. City of Key West, 875 So. 2d 650 (Fla. 3d DCA 2004) (two tour operators given exclusive franchises).
As to exclusive franchises, generally, see Am. Jur. 2d, Franchises from Public Entities §§ 27 to 34.

[5] United Railroads of San Francisco v. City and County of San Francisco, 249 U.S. 517, 39 S. Ct. 361, 63 L. Ed. 739 (1919).
As to granting competing franchises, see § 172.

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C. Special, Permissive, and Incidental Uses

1. In General

§ 170. Validity of legislative provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 88, 167

West's Key Number Digest, Municipal Corporations 679.1, 680

Legislative provisions relating to the granting of licenses or permits for particular uses of highways and streets, to be valid, must be general and impartial in their operation.[1] Thus, an ordinance prohibiting particular acts, such as changing the established grade of a sidewalk, without the consent of the city council, is valid, despite the possibility of discrimination in the granting of consent,[2] but there is also some authority to the contrary.[3] While ordinances that involve an improper delegation of legislative power or vest arbitrary discretion may be invalid,[4] the vesting of administrative discretion in this regard may be justified on the ground of practical necessity.[5]

Footnotes

1 State ex rel. Parker v. Frick, 150 Fla. 148, 7 So. 2d 152 (1942); Lynch v. Town of Northview, 73 W. Va. 609, 81 S.E. 833 (1914); Shields v. State, 187 Wis. 448, 204 N.W. 486, 40 A.L.R. 945 (1925).
As to First Amendment concerns with regard to use of public streets, see Am. Jur. 2d, Constitutional Law § 547.

2 Wilmot v. City of Chicago, 328 Ill. 552, 160 N.E. 206, 62 A.L.R. 394 (1927).

3 Lynch v. Town of Northview, 73 W. Va. 609, 81 S.E. 833 (1914).

4 Anderson v. Tedford, 80 Fla. 376, 85 So. 673, 10 A.L.R. 1481 (1920); Lynch v. Town of Northview, 73 W. Va. 609, 81 S.E. 833 (1914).

5 Davis v. Com. of Massachusetts, 167 U.S. 43, 17 S. Ct. 731, 42 L. Ed. 71 (1897); Commonwealth v. Kimball, 299 Mass. 353, 13 N.E.2d 18, 114 A.L.R. 1440 (1938); City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

a. Authority to Grant

§ 171. Authority to grant right of special use, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 683(1), 684, 685

A franchise, in the context of use of the streets, is a special privilege conferred by municipalities to public service corporations to use the streets in a manner not available to ordinary citizens of common right.[1] Similarly, a utility franchise is a privilege to use public streets or rights-of-way in connection with the utility's provision of services to residents within the governmental entity's jurisdiction.[2] A city acts in a governmental capacity in granting such a franchise.[3] A legislative grant to make special use of highways or streets should be in plain language, certain and definite in its nature, and free from ambiguity.[4]

Observation:

Franchise agreements are treated like contracts because they are simply contracts between a municipality and another party.[5]

The granting of a pipeline easement is not the grant of a "special privilege" or "franchise" by a city, within the meaning of a state constitutional provision prohibiting irrevocable or uncontrollable grants of special privileges, immunities, or franchises, but is a transfer of an interest in real property.[6]

Footnotes

1 City of Bisbee v. Arizona Water Co., 214 Ariz. 368, 153 P.3d 389 (Ct. App. Div. 2 2007).
As to franchises, generally, see Am. Jur. 2d, Franchises from Public Entities §§ 1 to 3.

2 Jacks v. City of Santa Barbara, 3 Cal. 5th 248, 219 Cal. Rptr. 3d 859, 397 P.3d 210 (Cal. 2017).

3 Burns v. City of Seattle, 161 Wash. 2d 129, 164 P.3d 475 (2007).

4 Detroit United Ry. v. City of Detroit, 229 U.S. 39, 33 S. Ct. 697, 57 L. Ed. 1056 (1913); Cleveland Elec. Ry. Co. v. City of Cleveland, 204 U.S. 116, 27 S. Ct. 202, 51 L. Ed. 399 (1907).

5 City of Tacoma v. City of Bonney Lake, 173 Wash. 2d 584, 269 P.3d 1017 (2012).

6 City of Lubbock v. Phillips Petroleum Co., 41 S.W.3d 149 (Tex. App. Amarillo 2000).

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C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

a. Authority to Grant

§ 172. Competing uses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporationspal 682(2), 686, 687

The mere grant to a public service company of the right to use the streets leaves the municipality free to grant similar privileges to other companies at any time.[1] A city may, but is not required to, agree not to compete with a franchisee during the life of a franchise to use city streets, and the grant of a nonexclusive franchise to use the streets to operate a utility does not prevent the city from operating a competing utility.[2]

A public service company that is lawfully operating in the streets may question the authority of another company to use the same streets for a similar and competing business,[3] on the basis that the company's franchise rights have been impaired.[4]

Footnotes

1 Public Service Com'n of Montana v. Great Northern Utilities Co., 289 U.S. 130, 53 S. Ct. 546, 77 L. Ed. 1080 (1933).

2 Burns v. City of Seattle, 161 Wash. 2d 129, 164 P.3d 475 (2007).

3 Wichita Transp. Co. v. People's Taxicab Co., 140 Kan. 40, 34 P.2d 550, 94 A.L.R. 771 (1934); Slusher v. Safety Coach Transit Co., 229 Ky. 731, 17 S.W.2d 1012, 66 A.L.R. 1378 (1929).

4 Slusher v. Safety Coach Transit Co., 229 Ky. 731, 17 S.W.2d 1012, 66 A.L.R. 1378 (1929).

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C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

a. Authority to Grant

§ 173. Subject to police power

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 683(1), 685

Special permission to occupy streets or highways for uses other than those strictly pertaining to their primary purpose are subject to the police power.[1] This rule applies to the subsurface as well as the surface.[2] Rights in streets or highways granted to individuals or corporations are subordinated to the superior rights of the public.[3] The grantee takes those rights subject to the paramount right of the public authorities to grade and improve the way and to make such requirements and regulations as are necessary and reasonable to make it suitable and convenient for the use of the traveling public,[4] and the grantee may be required to abandon the use granted, or to remove or change the location of structures erected under the grant, when demanded by the public necessity, convenience, or welfare.[5]

This power of the public authority may not be limited by contract.[6] Since the police power may not be surrendered,[7] the privileges or franchises of private individuals or corporations must be conclusively presumed to have been acquired with reference to its existence, and contract rights must yield to the proper burdens imposed by growth and development.[8]

Observation:

In the absence of an express and definite statutory provision to the contrary, a utility company maintains its structures and rights in a public street subject to the paramount right of the city to use its streets for all proper governmental purposes.[9] The principle that a utility's location of its facilities on public roads is subject to the public interest is longstanding.[10] Thus, utilities are charged with the knowledge that if they see fit to lay their lines in public roads, they do so subject to reasonable regulation by either the county or the city, as the case might be.[11]

Footnotes

[1] Puget Sound Traction, Light & Power Co. v. Reynolds, 244 U.S. 574, 37 S. Ct. 705, 61 L. Ed. 1325, 5 A.L.R. 13 (1917); State of Tenn. v. U.S., 256 F.2d 244 (6th Cir. 1958); Colorado & S. Ry. Co. v. City of Ft. Collins, 52 Colo. 281, 121 P. 747 (1912); Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926); City of Chicago v. O'Connell, 278 Ill. 591, 116 N.E. 210, 8 A.L.R. 916 (1917); Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954).
A restriction of the use of highways that is designed to promote the public convenience and the interest of all may not be disregarded by the attempted exercise of some civil right. Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

[2] New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905); People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915) (underground passageway); Lincoln Safe Deposit Co. v. City of New York, 210 N.Y. 34, 103 N.E. 768 (1913) (vault); City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960).
A utility's right in the surface or subsurface of public streets is subordinate to the public's right to health and safety, and subject to the government's police power. City of Bisbee v. Arizona Water Co., 214 Ariz. 368, 153 P.3d 389 (Ct. App. Div. 2 2007).
A township has general authority to enact a liquid livestock waste pipeline ban that prohibits the placement of any pipeline carrying liquid livestock waste under the township's road. Butler County Dairy, L.L.C. v. Butler County, 285 Neb. 408, 827 N.W.2d 267 (2013).

[3] Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky, 251 U.S. 173, 40 S. Ct. 104, 64 L. Ed. 210 (1919); Grand Trunk Western R. Co. v. City of South Bend, 227 U.S. 544, 33 S. Ct. 303, 57 L. Ed. 633 (1913); State of Tenn. v. U.S., 256 F.2d 244 (6th Cir. 1958); City and County of Denver v. Denver & R.G.R. Co., 63 Colo. 574, 167 P. 969 (1917), aff'd, 250 U.S. 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919); City of Vandalia v. Postal Tel.-Cable Co., 274 Ill. 173, 113 N.E. 65 (1916); Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 236 Ky. 376, 33 S.W.2d 344 (1930); Department of Highways v. Southwestern Elec. Power Co., 243 La. 564, 145 So. 2d 312 (1962); City of Mt. Vernon v. Berman & Reed, 100 Ohio St. 1, 125 N.E. 116 (1919); Portland Gas & Coke Co. v. Giebisch, 84 Or. 632, 165 P. 1004 (1917); Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954); Washington Natural Gas Co. v. City of Seattle, 60 Wash. 2d 183, 373 P.2d 133 (1962).

[4] People ex rel. New York Electric Lines Co. v. Squire, 145 U.S. 175, 12 S. Ct. 880, 36 L. Ed. 666 (1892); City and County of Denver v. Denver & R.G.R. Co., 63 Colo. 574, 167 P. 969 (1917), aff'd, 250 U.S. 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919); Department of Highways v. Southwestern Elec. Power Co., 243 La. 564, 145 So. 2d 312 (1962); City of Mt. Vernon v. Berman & Reed, 100 Ohio St. 1, 125 N.E. 116 (1919); Portland Gas & Coke Co. v. Giebisch, 84 Or. 632, 165 P. 1004 (1917); City of Madison v. Southern Wisconsin Ry. Co., 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910 (1914), aff'd, 240 U.S. 457, 36 S. Ct. 400, 60 L. Ed. 739 (1916).

[5] § 235.

[6] City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960).

[7] Am. Jur. 2d, Constitutional Law § 337.

[8] People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915); Department of Highways v. Southwestern Elec. Power Co., 243 La. 564, 145 So. 2d 312 (1962); City of Mt. Vernon v. Berman & Reed, 100 Ohio St. 1, 125 N.E. 116 (1919); City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960).

[9] Qwest Corp. v. City of Chandler, 222 Ariz. 474, 217 P.3d 424 (Ct. App. Div. 1 2009).

[10] Qwest Corp. v. City of Chandler, 222 Ariz. 474, 217 P.3d 424 (Ct. App. Div. 1 2009) (dates back at least to 1866).

[11] St. Charles County v. Laclede Gas Co., 2011 WL 396404 (Mo. Ct. App. E.D. 2011), transferred to Mo. S. Ct., 356 S.W.3d 137 (Mo. 2011).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

a. Authority to Grant

§ 174. Subject to police power—Limits on exercise of police power

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 683(1), 685

A municipality's power to regulate the use of a street or highway, pursuant to a special license or permit, in a manner not strictly pertaining to its primary use, may not be exercised at mere whim, but must be appropriate to and commensurate with the public necessity for the protection and promotion of public health, safety, necessity, or convenience.[1] Thus, a municipal corporation may not make contemplated consequences of the franchise the basis of a police regulation that, in effect, annuls the franchise altogether.[2] Also, a provision in a franchise agreement granting a utility the right to construct and maintain facilities under city streets, which acknowledged the potential for its alteration by the city's future ordinances enacted under the police power, did not authorize the adoption of ordinances that compromised the agreement's material terms, at least where the agreement imposed limitations on the city's unilateral alterations.[3]

Footnotes

1 City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N.W. 588 (1908); Lincoln Safe Deposit Co. v. City of New York, 210 N.Y. 34, 103 N.E. 768 (1913).

2 Grand Trunk Western R. Co. v. City of South Bend, 227 U.S. 544, 33 S. Ct. 303, 57 L. Ed. 633 (1913).

3 Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

a. Authority to Grant

§ 175. Estoppel to deny existence of grant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Estoppel 62

A public authority may be estopped by its conduct or acquiescence to deny that a public service corporation occupying a public way has the right to do so, or that consent was given to a franchise claimed by that company.[1] Some courts, however, have held that the right to make a special use of a highway may not be based on estoppel.[2]

An estoppel, where recognized, may be predicated only on such acts by the public authorities resulting in justifiable reliance.[3] The mere acquiescence in or failure to object to an unauthorized use will not necessarily preclude the public authority from terminating it.[4]

There is not an estoppel where the public authorities do not have the power to authorize the use in question, or where a statutory procedure for making the grants was not followed.[5] Nor can there be an estoppel where the licensee has not done work.[6]

Footnotes

1 City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U.S. 649, 32 S. Ct. 572, 56 L. Ed. 934 (1912); City of Summerville v. Georgia Power Co., 205 Ga. 843, 55 S.E.2d 540 (1949); City of Hagerstown v. Hagerstown Ry. Co. of Washington County, 123 Md. 183, 91 A. 170, 7 A.L.R. 1239 (1914); State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607, 106 A.L.R. 1169 (1936); Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 187 N.W. 790, 28 A.L.R. 960 (1922); Wetzel County Court v. Baltimore & O.R. Co., 77 W. Va. 538, 87 S.E. 884 (1916).

[2] City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 173 Wis. 400, 180 N.W. 339, 13 A.L.R. 802 (1920), modified on other grounds, 173 Wis. 400, 181 N.W. 821, 13 A.L.R. 802 (1921).

[3] State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607, 106 A.L.R. 1169 (1936).
A county was not estopped from denying the existence of a power company's easements for the placement of power poles along a right-of-way obtained by the county, absent a showing that the power company changed its position based on the county's actions. Bibb County v. Georgia Power Co., 241 Ga. App. 131, 525 S.E.2d 136 (1999).

[4] Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289 (1892); Callahan v. City of Nevada, 170 Iowa 719, 153 N.W. 188 (1915); Commonwealth v. Moorhead, 118 Pa. 344, 12 A. 424 (1888); Crocker v. Collins, 37 S.C. 327, 15 S.E. 951 (1892); Ralston v. Town of Weston, 46 W. Va. 544, 33 S.E. 326 (1899) (holding modified on other grounds by, State ex rel. Smith v. Kermit Lumber & Pressure Treating Co., 200 W. Va. 221, 488 S.E.2d 901 (1997)); City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 173 Wis. 400, 180 N.W. 339, 13 A.L.R. 802 (1920), modified on other grounds, 173 Wis. 400, 181 N.W. 821, 13 A.L.R. 802 (1921).

[5] Grand Trunk Western R. Co. v. City of South Bend, 227 U.S. 544, 33 S. Ct. 303, 57 L. Ed. 633 (1913); Murray v. City of Pocatello, 226 U.S. 318, 33 S. Ct. 107, 57 L. Ed. 239 (1912); Keyser v. City of Boise, 30 Idaho 440, 165 P. 1121 (1917); People ex rel. McCormick v. Western Cold Storage Co., 287 Ill. 612, 123 N.E. 43, 11 A.L.R. 437 (1919); Lacey v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542 (1909); Elizabeth City v. Banks, 150 N.C. 407, 64 S.E. 189 (1909); State v. Superior Court of King County, 67 Wash. 37, 120 P. 861 (1912).

[6] Elizabeth City v. Banks, 150 N.C. 407, 64 S.E. 189 (1909).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

a. Authority to Grant

§ 176. Judicial review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 689

Generally, the granting of authority to use the streets or other public ways for a special purpose or in a special manner is a legislative act, which is entirely beyond judicial review, so long as it is within constitutional limitations or legislative authorization, done in good faith, and not manifestly abusive or oppressive.[1] Conversely, the courts will interfere by granting an injunction or other appropriate remedy, to prevent the granting or exercise of such privileges, where the public authorities act or attempt to act beyond their power or jurisdiction, or where their acts are void because of fraud.[2] Mandamus may be available to require that public officials rescind special permits granted by them for the use of the public ways.[3]

One whose property has been damaged or depreciated in value due to the unlawful operation of a company allowed to use the streets may have standing in court to complain, but persons who have not been injured by that use may not ordinarily secure relief against it, especially in a collateral proceeding.[4]

Practice Tip:

A city council's passage of a resolution awarding a franchise to use the streets renders moot litigation challenging that use without a franchise.[5]

Footnotes

[1] People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915); Kentucky Utilities Co. v. Woodrum's Adm'r, 224 Ky. 33, 5 S.W.2d 283, 57 A.L.R. 1054 (1928); Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 P. 237 (1910); Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965).
As to the right to terminate or forfeit a street franchise and the remedies available, see §§ 188 to 194.

[2] State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

[3] State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

[4] Campbell v. Milwaukee Electric Ry. & Light Co., 169 Wis. 171, 170 N.W. 937, 6 A.L.R. 628 (1919).

[5] Council of City of New Orleans v. Sewerage And Water Bd. of New Orleans, 953 So. 2d 798 (La. 2007).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

b. Conditions

§ 177. Conditions for special use of highway, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 682(4)

A license or permit to use a highway or street for a particular purpose may be granted on such conditions, not requiring the relinquishment of constitutional or statutory rights, as the public authority sees fit to impose,[1] provided that they are reasonable and not against public policy.[2]

If the grant or license is accepted with the conditions attached, the grantee or licensee may not subsequently refuse to comply with them.[3] Conversely, if certain limitations are prescribed by the grant, additional ones may not be imposed by subsequent legislation enacted after the acceptance of the grant.[4] In other words, the grantee may not be deprived of the rights granted, except for cause and by due process of law.[5]

Footnotes

[1] Frost v. Railroad Commission of State of Cal., 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A.L.R. 457 (1926); Southern Pac. Co. v. City of Portland, 227 U.S. 559, 33 S. Ct. 308, 57 L. Ed. 642 (1913); Contra Costa County v. American Toll Bridge Co., 10 Cal. 2d 359, 74 P.2d 749 (1937); Georgia Ry. & Power Co. v. City of Atlanta, 154 Ga. 731, 115 S.E. 263 (1922); City of Vandalia v. Postal Tel.-Cable Co., 274 Ill. 173, 113 N.E. 65 (1916); Postal Telegraph Cable Co. v. City of Chicopee, 207 Mass. 341, 93 N.E. 927 (1911); State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607 (1932); In re Petition for Increase of Street Car Fares in City of Charlotte, 179 N.C. 151, 101 S.E. 619 (1919); Chrysler Light & Power Co. v. City of Belfield, 58 N.D. 33, 224 N.W. 871, 63 A.L.R. 1337 (1929); Lewis v. Nashville Gas & Heating Co., 162 Tenn. 268, 40 S.W.2d 409 (1931); Lynchburg Traction & Light Co. v. City of Lynchburg, 142 Va. 255, 128 S.E. 606, 43 A.L.R. 752 (1925); Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965).
The authority of a city to fix the terms and conditions on which utility companies may occupy its streets includes the

power to fix the term of occupation. Blair v. City of Chicago, 201 U.S. 400, 26 S. Ct. 427, 50 L. Ed. 801 (1906).
If a city grants a franchise to a utility to use its streets, it may do so on its own terms, conditions, and limitations. City of Lakewood v. Pierce County, 106 Wash. App. 63, 23 P.3d 1 (Div. 2 2001).

[2] Atlantic Coast Electric Ry. Co. v. Board of Public Utility Com'rs, 92 N.J.L. 168, 104 A. 218, 12 A.L.R. 737 (N.J. Ct. Err. & App. 1918).

[3] Southern Pac. Co. v. City of Portland, 227 U.S. 559, 33 S. Ct. 308, 57 L. Ed. 642 (1913).
As to forfeitures based on a failure to comply with conditions, see § 193.

[4] Russell v. Sebastian, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914).

[5] Russell v. Sebastian, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

b. Conditions

§ 178. Consent of or regulation by local authorities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 88, 167

West's Key Number Digest, Municipal Corporations 682(4)

Since the state has sole control of the streets and highways in it,[1] it may authorize their use for the purposes of travel and commerce without the consent of the municipalities through which they pass.[2] Whether that authority must be obtained from the municipal authorities by public service corporations therefore depends on the terms of the statutes regulating the matter, and if there is not a provision requiring that it be obtained, then it is not necessary.[3] Consent may be required, however, by the municipality acting either under its delegated power to control and regulate its streets or under direct statutory authority.[4] Even where public utilities are required to obtain the consent of a local government to use public rights-of-way, a municipality may not withhold consent unreasonably or arbitrarily.[5]

Where a state constitution expressly provides that persons or corporations may establish and operate works in the public streets for supplying the inhabitants with public services, on such conditions and regulations as the municipality may prescribe, an ordinance prohibiting the making of any excavation in the streets without a permit from the municipal authorities is valid, and may be enforced against a public service corporation.[6]

A grant of a certificate of public convenience and necessity by a state public service commission to a public service corporation does not dispense with the consent of the local authorities required by a statute providing that any municipality may, by ordinance, prescribe the conditions on which such a corporation may place its appliances in public ways within the corporate limits.[7] Nor does such a certificate entitle the corporation to continue to occupy streets after its franchise has expired.[8] The municipality may also have the power to regulate the rates charged to consumers by a utility that uses its streets and public places, if the state legislature has not assumed that power.[9] On the other hand, while a state public utilities commission does not have the power to grant a public utility a franchise to use a home rule city's streets in the absence of the municipality's consent, a local government may not deny consent to a regulated utility's use of public rights-of-way, if the ordinance is preempted by state law in a matter of statewide or mixed local and state concern.[10] There is also authority that

local units of government do not have the authority to regulate tree trimming in public rights-of-way used by electric companies, where a municipal statute was not an exception to the regulatory powers of the public utility commission over public utility services.[11]

Provisions that require prior consent of a municipality to the use of its streets for railway purposes necessarily authorize the municipality to refuse that consent.[12]

Footnotes

1 § 160.

2 City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U.S. 649, 32 S. Ct. 572, 56 L. Ed. 934 (1912).

3 Missouri Pac. Ry. Co. v. Sproul, 99 Kan. 608, 162 P. 293 (1917); City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944).
A statute granted a city the authority to grant a franchise to a county sewer system to use city streets, but the city could not require that the county enter into a franchise agreement. City of Lakewood v. Pierce County, 106 Wash. App. 63, 23 P.3d 1 (Div. 2 2001).

4 City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U.S. 649, 32 S. Ct. 572, 56 L. Ed. 934 (1912); San Antonio Traction Co. v. Altgelt, 200 U.S. 304, 26 S. Ct. 261, 50 L. Ed. 491 (1906); Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 149 Ga. 1, 98 S.E. 696, 5 A.L.R. 1 (1919); City of Chicago v. O'Connell, 278 Ill. 591, 116 N.E. 210, 8 A.L.R. 916 (1917); Kentucky Utilities Co. v. Woodrum's Adm'r, 224 Ky. 33, 5 S.W.2d 283, 57 A.L.R. 1054 (1928); State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607 (1932); Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 P. 237 (1910); People ex rel. New York Edison Co. v. Willcox, 207 N.Y. 86, 100 N.E. 705 (1912); West Tex. Utilities Co. v. City of Baird, 286 S.W.2d 185 (Tex. Civ. App. Eastland 1956), writ refused n.r.e.; Salt Lake City v. Utah Light & Traction Co., 52 Utah 210, 173 P. 556, 3 A.L.R. 715 (1918); City of Portsmouth v. Virginia Railway & Power Co., 141 Va. 54, 126 S.E. 362, 39 A.L.R. 1510 (1925); City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13, 129 N.W. 925 (1911).
Charter authority of a municipality "to regulate its streets and alleys" gives it the power to grant a franchise to a telephone company to place and maintain its poles and wires along city streets. City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 33 S. Ct. 988, 57 L. Ed. 1389 (1913).

5 TCG Detroit v. City of Dearborn, 261 Mich. App. 69, 680 N.W.2d 24 (2004).

6 Ex parte Russell, 163 Cal. 668, 126 P. 875 (1912), rev'd on other grounds, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914).

7 State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607, 106 A.L.R. 1169 (1936).

8 State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 339 Mo. 385, 96 S.W.2d 607, 106 A.L.R. 1169 (1936).

9 TCG Detroit v. City of Dearborn, 261 Mich. App. 69, 680 N.W.2d 24 (2004).

10 City of Fort Morgan v. Colorado Public Utilities Com'n, 159 P.3d 87 (Colo. 2007).

11 PECO Energy Co. v. Township of Upper Dublin, 922 A.2d 996 (Pa. Commw. Ct. 2007) (also holding that a provision in the business corporation statute, which required that public utilities obtain permits and otherwise comply with municipal regulations affecting public ways before entering those ways, did not authorize a township to regulate how a public utility trimmed trees, since the provision was a grant of power to utilities, not a limitation, and the provision did not grant power to municipalities).

12 Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 149 Ga. 1, 98 S.E. 696, 5 A.L.R. 1 (1919); City of Portsmouth v. Virginia Railway & Power Co., 141 Va. 54, 126 S.E. 362, 39 A.L.R. 1510 (1925); City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13, 129 N.W. 925 (1911).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

b. Conditions

§ 179. Consent of electors or abutting owners

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 682(4)

The consent of the abutting owners or of the electors may be required as a condition precedent to the right to use or to authorize the use of streets or other highways for a special purpose or in a special manner.[1] If prior consent of the voters is not obtained, an ordinance purporting to grant the right to use the streets for a special purpose is invalid.[2]

State constitutions and statutes may require, as a condition precedent to granting a street franchise, that the consent of a specified portion of the abutting owners be obtained.[3] Statutory provisions requiring such consent have been upheld against the objection that they contravene constitutional prohibitions against the granting of special privileges.[4] In the absence of any such requirement, an abutting owner, even though an owner of the fee of the highway, may not object to a use of it that is incident to its primary use, unless it constitutes an additional servitude or otherwise causes the abutter special injury.[5]

Footnotes

1 Baker v. Denver Tramway Co., 72 Colo. 233, 210 P. 845, 29 A.L.R. 1453 (1922); Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 187 N.W. 790, 28 A.L.R. 960 (1922).
A state constitutional provision that requires voter approval before a municipality grants, extends, or renews a franchise to a public utility to use public ways applied to a utility—which, prior to the city's annexation of a tract, had provided electric service to a few customers living in the annexed area—to expand its service beyond the annexed area, the purpose of the provision being to give the electorate of a municipality absolute control over the granting of franchises. Oklahoma Elec. Co-op., Inc. v. Oklahoma Gas and Elec. Co., 1999 OK 35, 982 P.2d 512 (Okla. 1999), as corrected, (May 5, 1999).

[2] Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 187 N.W. 790, 28 A.L.R. 960 (1922).

[3] Underground R.R. of City of New York v. City of New York., 193 U.S. 416, 24 S. Ct. 494, 48 L. Ed. 733 (1904).

[4] Mader v. City of Topeka, 106 Kan. 867, 189 P. 969, 15 A.L.R. 340 (1920); McFall v. City of St. Louis, 232 Mo. 716, 135 S.W. 51 (1911).

[5] Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N.W. 219, 33 A.L.R. 351 (1924).

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C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

b. Conditions

§ 180. Fees, taxes, and charges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 682(4)

A "franchise fee" is a payment exacted in exchange for the right or privilege to use and occupy city streets.[1] Where a license or permit is required as a condition of the right to use highways and streets for particular purposes, a reasonable fee or charge may be charged for the purpose of covering the cost of issuing the license or permit and of supervising or regulating the authorized use.[2] The legislature may also impose or authorize the imposition of a tax or charge for particular permissive uses for highway maintenance or for general revenue purposes,[3] although a locality is not compelled to do so.[4] Therefore, governments might not be under a mandate to charge for the use of rights-of-way.[5]

While compensation may not be exacted from abutting owners for the enjoyment of proprietary rights in the way, to which they are entitled as of right,[6] a charge may be exacted where a municipality grants an abutting owner permission to use the public streets for a permanent structure for the conduct of his or her private business.[7] Since a municipality has plenary power to refuse to permit any person to build or maintain, in a public street, a permanent structure for use in the conduct of a private business,[8] it follows that the municipality may charge such fees as it deems proper, and the courts may not enjoin their collection, regardless of the amount.[9]

Footnotes

1 Burns v. City of Seattle, 161 Wash. 2d 129, 164 P.3d 475 (2007).

2 Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941); Mackay Telegraph & Cable Co. v. City of Little Rock, 250 U.S. 94, 39 S. Ct. 428, 63 L. Ed. 863 (1919); Postal Telegraph-Cable Co. v. City of Richmond, 249 U.S. 252, 39 S. Ct. 265, 63 L. Ed. 590 (1919); City of Hanford v.

Hanford Gas & Power Co., 169 Cal. 749, 147 P. 969 (1915); Appleton v. City of New York, 219 N.Y. 150, 114 N.E. 73, 7 A.L.R. 629 (1916); Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).

If a franchise agreement was reached allowing a county to operate sewer lines under a city's streets, the city has the implied right to collect a franchise fee from the county for use and occupation of the streets; the proposed franchise fee is a fee and not a tax, and thus does not require express legislative authority, where the fee's primary purpose was to pay for regulation and not to raise revenue, the money collected was to be allocated only to reimburse the city for the costs associated with the operation of the sewer system under the city's streets, and there was a direct relationship between the fee and those costs. City of Lakewood v. Pierce County, 106 Wash. App. 63, 23 P.3d 1 (Div. 2 2001).

City ordinances imposing a requirements-based fee to be paid by telecommunications providers using the city's rights-of-way were authorized by a statute expressly granting the city the power to determine by ordinance the terms and conditions on which a public utility may be permitted to occupy streets, highways, or other public property within the city, and was a permissible charge for commercial use of city-owned property to generate private profit, rather than an impermissible tax. City of Gary v. Indiana Bell Telephone Co., Inc., 732 N.E.2d 149 (Ind. 2000).

[3] District of Columbia v. R.P. Andrews Paper Co., 256 U.S. 582, 41 S. Ct. 545, 65 L. Ed. 1103 (1921); Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 93 N.E. 153 (1910); State v. Gish, 168 Iowa 70, 150 N.W. 37 (1914); State v. Lawrence, 108 Miss. 291, 66 So. 745 (1914); Kane v. Titus, 81 N.J.L. 594, 80 A. 453 (N.J. Ct. Err. & App. 1911), aff'd, 242 U.S. 160, 37 S. Ct. 30, 61 L. Ed. 222 (1916); Road Trustees v. George C. Brown & Co., 159 N.C. 175, 75 S.E. 40 (1912); City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944).

[4] City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944).

[5] Directv, Inc. v. Treesh, 487 F.3d 471, 51 A.L.R.6th 605 (6th Cir. 2007).

[6] § 126.

[7] Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965) (allowing a charge based on square footage, since potential costs to the municipality for clearing or restoring those areas for public use may depend on the square footage of the area used and the character of the use granted).

[8] §§ 210, 211.

[9] Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965).

As to the right to charge or exact fees for the ordinary or general use of a highway, see §§ 597 to 619.

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John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Glenda K. Harnad, J.D.; Janice Holben, J.D.; and Jeffrey J. Shampo, J.D.

IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

b. Conditions

§ 181. Fees, taxes, and charges—For use by public utility companies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 682(4)

A city may require compensation for the use of the public streets by a utility company as a condition of granting a franchise, unless this is forbidden by a statute or contrary to public policy.[1] When public utilities are required to obtain the consent of a local government to use public rights-of-way,[2] a city may negotiate a contract for the fees the public utility must pay to obtain that consent.[3] While it has been recognized that franchisees are willing to pay a fee for the privilege of using public streets or rights-of-way to do business with a municipality's residents,[4] a municipal corporation might not have the authority, under its general powers, to impose a rental for the use of its streets by public utility companies.[5] State law may also limit the fees a city may charge a utility to use the city's right-of-way, without impinging on the city's right of reasonable control of its streets or to withhold its consent to the public utility.[6]

The obligation of a franchise granting an irrevocable easement to a public utility company is unconstitutionally impaired by a subsequent ordinance requiring the payment to the municipality of a monthly rental for use and occupation of the streets.[7] A municipality's authority to raise a fee charged to a utility for cables strung along a city street may be limited by state statutes.[8] On the other hand, a state statute that prohibits municipalities from levying franchise fees for cable television, including fees intended as compensation for the use of the municipalities' rights-of-way, may violate the state's constitution.[9]

If a city charges a fee for its consent to a public utility to use rights-of-way, that fee may be required to be based on the expense to the city of issuing a license and of supervising the activity, if supervision is required.[10] A city ordinance that authorizes a city to impose a franchise fee on a sanitary authority for its use of the city's rights-of-way is not preempted where the city's franchise fee does not seek to set rates for the authority's customers and its intended purpose is to cover the city's costs and the impacts to its streets and rights-of-way in connection with the authority's sewage system.[11] Additional administrative overhead incurred by a city as consequence of the presence of utilities in a right-of-way is includable as incidental costs of utility franchises, for purposes of a statutory requirement that a city's franchise fees be reasonably related to the city's administrative expenses in exercising its police power.[12] However, costs that a city would incur to maintain the

right-of-way even if gas and electric utilities were not located there were not allowable as incidental costs of utility franchises.[13]

Footnotes

1 Burns v. City of Seattle, 161 Wash. 2d 129, 164 P.3d 475 (2007) (further noting that for the purposes of a state statute providing that, generally, a city may not impose a franchise fee or any other fee or charge on a light and power businesses for the use of a right-of-way, imposition of a payment obligation may occur not only by compulsion, but also by contract).

2 § 178.

3 TCG Detroit v. City of Dearborn, 261 Mich. App. 69, 680 N.W.2d 24 (2004).

4 South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 596 S.E.2d 482 (2004) (allowing the imposition of franchise fees for territory annexed to the city).

5 Postal Telegraph Cable Co. v. City of Chicopee, 207 Mass. 341, 93 N.E. 927 (1911).

6 TCG Detroit v. City of Dearborn, 261 Mich. App. 69, 680 N.W.2d 24 (2004).

7 Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).
Municipalities violated the Contract Clause (U.S. Const. Art. I, § 10, cl. 1) by substantially impairing franchise agreements under which suppliers of electricity, gas, and cable television were allowed to excavate in streets, when the agreements contemplated that street damage restoration fees would not be imposed in addition to those contained in the agreements, and the municipalities later enacted ordinances imposing additional fees. Pacific Gas and Elec. Co. v. City of Union City, 220 F. Supp. 2d 1070 (N.D. Cal. 2002).

8 City of Macon v. Alltel Communications, Inc., 277 Ga. 823, 596 S.E.2d 589 (2004).

9 Kentucky CATV Association, Inc. v. City of Florence, 520 S.W.3d 355 (Ky. 2017).

10 TCG Detroit v. City of Dearborn, 261 Mich. App. 69, 680 N.W.2d 24 (2004).

11 Rogue Valley Sewer Services v. City of Phoenix, 262 Or. App. 183, 329 P.3d 1 (2014), decision aff'd, 357 Or. 437, 353 P.3d 581 (2015).

12 Kragnes v. City of Des Moines, 810 N.W.2d 492 (Iowa 2012).

13 Kragnes v. City of Des Moines, 810 N.W.2d 492 (Iowa 2012).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

c. Validity of Grant

§ 182. Validity of grant for special use of highway, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 683(1)

To be valid, a grant of a right to a special use of a highway must be within constitutional limits,[1] made by an officer or body vested with authority for that purpose,[2] and in compliance with mandatory requirements with respect to the method and procedure.[3] A preempted provision in a franchise agreement allowing the installation and operation of a utility system in city streets is severable, where the agreement contained a severability provision and remained enforceable without the invalid term.[4]

If the legislature ratifies the grant of a franchise by a municipal corporation, which was originally ultra vires, the grant will be protected to the same extent as if it were originally valid.[5]

Footnotes

1 § 183.

2 § 167.

3 State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

4 Time Warner Telecom of Oregon, LLC v. City of Portland, 452 F. Supp. 2d 1084 (D. Or. 2006), aff'd in part, rev'd in part on other grounds, 322 Fed. Appx. 496 (9th Cir. 2009).

5 City of Minneapolis v. Minneapolis St. Ry. Co., 215 U.S. 417, 30 S. Ct. 118, 54 L. Ed. 259 (1910).

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C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

c. Validity of Grant

§ 183. Discrimination; prohibition of special privileges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 683(1)

In authorizing the use of highways for a special purpose or in a special manner, the public authorities may not unjustly discriminate between individuals or classes of individuals.[1] They may, however, discriminate between particular special uses, and between the persons who may exercise them, on a reasonable basis of classification.[2] Constitutional prohibitions against the granting of special or exclusive privileges[3] may be applicable to authorizations of special uses of highways, rendering them invalid.[4]

Denials of licenses to use the streets will be upheld if they have a rational basis.[5]

Footnotes

1 Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913) (overruled on other grounds by, City of Orange Beach v. Benjamin, 821 So. 2d 193 (Ala. 2001)); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).

2 Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).

3 Am. Jur. 2d, Constitutional Law §§ 921 to 925.

4 People ex rel. Healy v. Clean Street Co., 225 Ill. 470, 80 N.E. 298 (1907); McClintock v. Richlands Brick Corp., 152 Va. 1, 145 S.E. 425, 61 A.L.R. 1033 (1928).

5 Oh v. City of New York, 306 A.D.2d 25, 761 N.Y.S.2d 636 (1st Dep't 2003).

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C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

d. Construction and Effect of Grant

§ 184. Construction and effect of grant for special use of highway, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 684

Generally, every grant in derogation of the right of the public to the use of the streets will be construed strictly against the grantee and in favor of the public.[1] Plain words and sentences will be given their plain meaning.[2] However, if there is language equally capable of two constructions, the construction that safeguards the public interest is given preference over one that secures only an insignificant or insubstantial advantage to the public.[3]

The principle that grants to use streets are to be construed in favor of the public does not mean that an offer to make a grant is not to receive a fair and reasonable interpretation, nor does that principle justify the withholding, after the acceptance of the grant, of what the grant apparently was intended to convey.[4] The grant is not to be destroyed by an unreasonable or narrow interpretation.[5]

In the absence of some controlling rule of law, the court, in construing a franchise granted by a municipality, will follow the contemporaneous construction placed on the franchise by the legislative body of the municipality.[6]

A grant by the legislature or a municipality to a public service corporation of a right to use the streets or highways is merely a grant of a right against the public as distinguished from private rights, and it neither divests any private right nor justifies any invasion of it.[7] Those grants are also subject to the condition, implied if not expressed, that the grantee will not materially interfere with any other lawful use of the highway.[8]

The laws in effect at the time of the grant of a franchise allowing the maintenance of utilities on the public right-of-way become part of the franchise contract.[9]

Footnotes

1 District of Columbia v. R.P. Andrews Paper Co., 256 U.S. 582, 41 S. Ct. 545, 65 L. Ed. 1103 (1921); Detroit United Ry. v. People of State of Michigan, 242 U.S. 238, 37 S. Ct. 87, 61 L. Ed. 268 (1916); Southern Wisconsin Ry. Co. v. City of Madison, 240 U.S. 457, 36 S. Ct. 400, 60 L. Ed. 739 (1916); Little Rock Ry. & Elec. Co. v. Dowell, 101 Ark. 223, 142 S.W. 165 (1911); Ex parte Russell, 163 Cal. 668, 126 P. 875 (1912), rev'd on other grounds, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914); Russell v. Kentucky Utilities Co., 231 Ky. 820, 22 S.W.2d 289, 66 A.L.R. 1238 (1929); City of Benton Harbor v. Michigan Fuel & Light Co., 250 Mich. 614, 231 N.W. 52, 71 A.L.R. 114 (1930); City of Duluth v. Duluth Street Ry. Co., 137 Minn. 286, 163 N.W. 659, 10 A.L.R. 904 (1917); Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 187 N.W. 790, 28 A.L.R. 960 (1922); State ex rel. De Burg v. Water Supply Co. of Albuquerque, 1914-NMSC-028, 19 N.M. 36, 140 P. 1059 (1914); Brooklyn Heights R. Co. v. Steers, 213 N.Y. 76, 106 N.E. 919 (1914); East Ohio Gas Co. v. City of Akron, 81 Ohio St. 33, 90 N.E. 40 (1909); Norfolk & P. Traction Co. v. City of Norfolk, 115 Va. 169, 78 S.E. 545 (1912); City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944); City of Madison v. Southern Wisconsin Ry. Co., 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910 (1914), aff'd, 240 U.S. 457, 36 S. Ct. 400, 60 L. Ed. 739 (1916).

2 State ex rel. City of Milwaukee v. Milwaukee Electric Railway & Light Co., 151 Wis. 520, 139 N.W. 396 (1913).

3 State ex rel. City of Milwaukee v. Milwaukee Electric Railway & Light Co., 151 Wis. 520, 139 N.W. 396 (1913).

4 Russell v. Sebastian, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914).

5 Blair v. City of Chicago, 201 U.S. 400, 26 S. Ct. 427, 50 L. Ed. 801 (1906).

6 McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 P. 896 (1910).

7 Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906 (1911); McKay v. City of Enid, 1910 OK 143, 26 Okla. 275, 109 P. 520 (1910).

8 People ex rel. New York Electric Lines Co. v. Squire, 145 U.S. 175, 12 S. Ct. 880, 36 L. Ed. 666 (1892); Opdycke v. Public Service Ry. Co., 78 N.J.L. 576, 76 A. 1032 (N.J. Ct. Err. & App. 1910).

9 Florida Power Corp. v. City of Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001) (rejecting the contention that the power company agreed to an arbitration provision, required by statute, as a result of duress).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

d. Construction and Effect of Grant

§ 185. Streets to which grant extends

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 685

A grant in general terms of authority to occupy the streets of a municipality with the facilities or structures of a public utility company extends not only to the streets existing at the time of the grant, but also to those subsequently opened.[1] It is not necessary to apply for a new grant whenever a new street is opened or an old one extended, and a subsequent ordinance in such a case requiring the consent of the municipal authorities before putting utility lines in new streets is an unconstitutional impairment of the contract with the company.[2] Similarly, a general franchise granting the right to use the streets of a municipality extends to territory subsequently annexed to the municipality.[3] Where a company has a franchise to provide public utility services in an area subsequently annexed by another political subdivision, it may not be compelled to secure a franchise from the latter to provide those services,[4] although it is subject to the latter's control and regulation in the exercise of the police power.[5]

Footnotes

1 Russell v. Sebastian, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914); Seattle Lighting Co. v. City of Seattle, 54 Wash. 9, 102 P. 767 (1909).

2 Russell v. Sebastian, 233 U.S. 195, 34 S. Ct. 517, 58 L. Ed. 912 (1914).

3 Western Gas Co. of Washington v. City of Bremerton, 21 Wash. 2d 907, 153 P.2d 846 (1944).
As to whether voter consent is required to further extend service, see § 179.

4 Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913) (overruled on other grounds by, City of

Orange Beach v. Benjamin, 821 So. 2d 193 (Ala. 2001)); People ex rel. Rockwell v. Chicago Telephone Co., 245 Ill. 121, 91 N.E. 1065 (1910); Public Service Corp. v. Town of Westfield, 80 N.J. Eq. 295, 84 A. 718 (Ch. 1912), aff'd, 82 N.J. Eq. 662, 91 A. 740 (Ct. Err. & App. 1914).

5 City of Westport v. Mulholland, 159 Mo. 86, 60 S.W. 77 (1900).

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C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

e. Duration of Grant

§ 186. Duration of grant of special use of highway, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 682(3)

The duration of the right acquired by the grant of the use of streets for special purposes is to be determined by the language of the grant and the extent of the interest that the grantor had authority to convey.[1] Constitutional or statutory provisions may limit the term for which such a franchise may be granted.[2] Subject to limitations that may be imposed by a state's constitution, statute, or policy, a government body has the authority to determine the duration of the grant.[3]

In the absence of a constitutional or statutory provision to that effect, a grant to a public service company of the privilege of using the streets need not be limited to the corporate life of the parties.[4] The franchise may survive the dissolution of the grantee corporation.[5]

A grant of the right to use the streets for a definite term ordinarily ceases with the expiration of that term.[6] There is, however, authority to the effect that where the occupation of the highway by a public utility is essential to the rendition of its services, that right continues so long as it is under a public duty to furnish those services, notwithstanding that the formal term of its franchise may have expired.[7] A utility company that continues its occupancy and operations after the expiration of the term of its franchise may be treated as occupying the status of a tenant by sufferance.[8] Another exception to the general rule that a utility's continued use of a right-of-way is illegal after the expiration of the franchise is recognized when the parties to the franchise continue to perform in the same manner as when the franchise was formally in effect.[9] In such a case, the company continues to operate under an implied contract, cancelable on reasonable notice, under the same terms and conditions as the franchise ordinance.[10]

Footnotes

1 Cleveland Elec. Ry. Co. v. City of Cleveland, 204 U.S. 116, 27 S. Ct. 202, 51 L. Ed. 399 (1907).

2 City and County of Denver v. New York Trust Co., 229 U.S. 123, 33 S. Ct. 657, 57 L. Ed. 1101 (1913).

3 Burr v. City of Columbus, Ohio, 249 U.S. 415, 39 S. Ct. 354, 63 L. Ed. 679 (1919); Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, 249 U.S. 399, 39 S. Ct. 349, 63 L. Ed. 669, 6 A.L.R. 1648 (1919).

4 Georgia Power Co. v. City of Decatur, 281 U.S. 505, 50 S. Ct. 369, 74 L. Ed. 999 (1930); City of Minneapolis v. Minneapolis St. Ry. Co., 215 U.S. 417, 30 S. Ct. 118, 54 L. Ed. 259 (1910).

5 Banton v. Belt Line Ry. Corporation, 268 U.S. 413, 45 S. Ct. 534, 69 L. Ed. 1020 (1925).

6 Bankers' Trust Co v. City of Raton, 258 U.S. 328, 42 S. Ct. 340, 66 L. Ed. 642 (1922); City of Bridgeton v. Missouri-American Water Co., 219 S.W.3d 226 (Mo. 2007) (holding that when the term expires, continued use is illegal, and the utility acts outside of its granted powers).

7 Miller v. Incorporated Town of Milford, 224 Iowa 753, 276 N.W. 826, 114 A.L.R. 1423 (1937); City of Benton Harbor v. Michigan Fuel & Light Co., 250 Mich. 614, 231 N.W. 52, 71 A.L.R. 114 (1930).

8 Detroit United Ry. v. City of Detroit, 255 U.S. 171, 41 S. Ct. 285, 65 L. Ed. 570 (1921); City and County of Denver v. Denver Union Water Co., 246 U.S. 178, 38 S. Ct. 278, 62 L. Ed. 649 (1918).

9 City of Bridgeton v. Missouri-American Water Co., 219 S.W.3d 226 (Mo. 2007).

10 City of Bridgeton v. Missouri-American Water Co., 219 S.W.3d 226 (Mo. 2007).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

2. Granting Right of Special Use

e. Duration of Grant

§ 187. Permanent or perpetual grants

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 682(3)

Except as restrained by a state statute or policy, a unit of government vested with the power to authorize the use of streets for special purposes may make the grant permanent or perpetual.[1] Assuming the power to grant a street franchise in perpetuity, a street franchise that is silent about the term of its duration, whether granted to an individual or corporation, is in perpetuity where the grant runs to successors and assigns and is capable of surviving the grantee's life.[2] However, there is other authority that the grant of a street franchise without a time limit is not perpetual,[3] particularly where the grant is not made to the grantee and the grantee's successors and assigns.[4] For instance, when a time is not fixed when rights to use the streets ceases, those rights do not exist in perpetuity, but end when the municipality granting the right ceases to exist.[5]

Footnotes

1 City of Covington v. South Covington & C. St. Ry. Co., 246 U.S. 413, 38 S. Ct. 376, 62 L. Ed. 802, 2 A.L.R. 1099 (1918); City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 33 S. Ct. 988, 57 L. Ed. 1389 (1913).

2 City of Covington v. South Covington & C. St. Ry. Co., 246 U.S. 413, 38 S. Ct. 376, 62 L. Ed. 802, 2 A.L.R. 1099 (1918); City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 33 S. Ct. 988, 57 L. Ed. 1389 (1913); Northern Pac. Ry. Co. v. Hirzel, 29 Idaho 438, 161 P. 854 (1916).

3 State v. Des Moines City Ry. Co., 159 Iowa 259, 140 N.W. 437 (1913).

4 People ex rel. Pearce v. Commercial Tel. & Tel. Co., 277 Ill. 265, 115 N.E. 379 (1917).

5 Illinois-American Water Co. v. City of Peoria, 332 Ill. App. 3d 1098, 266 Ill. Dec. 277, 774 N.E.2d 383 (3d Dist.

2002).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

a. In General

§ 188. Termination or revocation of grant of special use of highway, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 690

Termination of the franchise rights of a public service company ends the binding effect of the franchise contract.[1] Rights of lessees operating under the franchise are also terminated.[2]

A franchise to use the streets is not necessarily a license, and may become a binding contract.[3] The franchise is not revocable at the pleasure of the municipality granting it, if the grant is for an adequate consideration and is accepted by the grantee.[4] Thus, once accepted, a franchise agreement allowing use of a municipality's streets is irrevocable unless the agreement expressly reserves the right of revocation.[5]

Where the right to use the streets is made revocable by the express terms of the grant, the user may not complain about the exercise of that power.[6]

Since regulation of the termination of utility service is a matter of statewide concern, a municipality does not have the power to exercise control of its municipal property in a manner that would be inconsistent with the state's regulations.[7]

Footnotes

1 Chicago, L. S. & S. B. Ry. Co. v. Guilfoyle, 198 Ind. 9, 152 N.E. 167, 46 A.L.R. 1465 (1926).

2 Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923).

3 Chicago Limousine Service, Inc. v. City of Chicago, 335 Ill. App. 3d 489, 269 Ill. Dec. 624, 781 N.E.2d 421 (1st Dist.

2002); Burns v. City of Seattle, 161 Wash. 2d 129, 164 P.3d 475 (2007).
As to the treatment of franchise agreements like contracts, see § 171.

[4] Chicago Limousine Service, Inc. v. City of Chicago, 335 Ill. App. 3d 489, 269 Ill. Dec. 624, 781 N.E.2d 421 (1st Dist. 2002).

[5] Florida Power Corp. v. City of Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001).

[6] Northern Ohio Traction & Light Co. v. State of Ohio ex rel. Pontius, 245 U.S. 574, 38 S. Ct. 196, 62 L. Ed. 481 (1918); Southern Pac. Co. v. City of Portland, 227 U.S. 559, 33 S. Ct. 308, 57 L. Ed. 642 (1913).

[7] Dublin v. State, 118 Ohio Misc. 2d 18, 2002-Ohio-2431, 769 N.E.2d 436 (C.P. 2002).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

a. In General

§ 189. Grant for grantee's private benefit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 690

Generally, where the particular use of the right-of-way is for the sole benefit of the grantee, without compensation or other benefit to the public, the grant is a mere license, which, in the absence of any provision to the contrary, may be revoked at the pleasure of the public authorities,[1] in the absence of circumstances that would estop revocation of the grant.[2] Anyone obtaining a permit from a municipality for the private use of a public street takes it with notice that it is subject to revocation at the will of the municipality, and it does not matter whether the use is made in accordance with a permit or without one, because the use is merely permissive in either case and revocable at any time without notice.[3]

Observation:

When a license is required to conduct business on city streets, the issuance of a license does not create a vested property right, but, rather, a revocable privilege to do an act or a series of acts upon the land of another without possessing any estate or interest in such land.[4]

Footnotes

[1] District of Columbia v. R.P. Andrews Paper Co., 256 U.S. 582, 41 S. Ct. 545, 65 L. Ed. 1103 (1921); El Dorado County v. Al Tahoe Inv. Co., 175 Cal. App. 2d 407, 346 P.2d 205 (3d Dist. 1959); Keyser v. City of Boise, 30 Idaho 440, 165 P. 1121 (1917); Tacoma Safety Deposit Co. v. City of Chicago, 247 Ill. 192, 93 N.E. 153 (1910) (vault); Callahan v. City of Nevada, 170 Iowa 719, 153 N.W. 188 (1915); Lincoln Safe Deposit Co. v. City of New York, 210 N.Y. 34, 103 N.E. 768 (1913).

[2] § 192.

[3] Keyser v. City of Boise, 30 Idaho 440, 165 P. 1121 (1917).

[4] LMP Services, Inc. v. City of Chicago, 2017 IL App (1st) 163390, 420 Ill. Dec. 163, 95 N.E.3d 1259 (App. Ct. 1st Dist. 2017), appeal allowed, 420 Ill. Dec. 731, 98 N.E.3d 35 (Ill. 2018).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

a. In General

§ 190. Grant for public benefit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 690

A grant of authority to construct and operate or maintain a public utility or a structure or instrumentality that otherwise serves the public convenience may constitute a mere revocable license,[1] even though the requisite elements of a franchise are ordinarily present, as where the grant is made on specified conditions that have been accepted and implemented.[2] On the other hand, upon acceptance, the grant usually becomes a contract between the public authority and the grantee, which is within the protection of constitutional provisions prohibiting the impairment of contracts,[3] and may not be arbitrarily rescinded or revoked.[4]

Footnotes

1 People ex rel. Fitzhenry v. Union Gas & Elec. Co., 254 Ill. 395, 98 N.E. 768 (1912); Lacey v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542 (1909); Selectmen of Amesbury v. Citizens' Electric St. R. Co., 199 Mass. 394, 85 N.E. 419 (1908).

2 Ohio Public Service Co. v. State of Ohio ex rel. Fritz, 274 U.S. 12, 47 S. Ct. 480, 71 L. Ed. 898, 5 Ohio L. Abs. 377 (1927); Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, 249 U.S. 399, 39 S. Ct. 349, 63 L. Ed. 669, 6 A.L.R. 1648 (1919); Natural Gas & Fuel Corp. v. Norphlet Gas & Water Co., 173 Ark. 174, 294 S.W. 52 (1927); People ex rel. Foley v. Begole (State Report Title: People ex rel. Foley v. Stapleton), 98 Colo. 354, 56 P.2d 931 (1936); Georgia Ry. & Power Co. v. City of Atlanta, 154 Ga. 731, 115 S.E. 263 (1922); City of Vandalia v. Postal Tel.-Cable Co., 274 Ill. 173, 113 N.E. 65 (1916); State ex rel. Shaver v. Iowa Telephone Co., 175 Iowa 607, 154 N.W. 678 (1915); City of Dayton v. South Covington & C. St. Ry. Co., 177 Ky. 202, 197 S.W. 670 (1917); City of Benton Harbor v. Michigan Fuel & Light Co., 250 Mich. 614, 231 N.W. 52, 71 A.L.R. 114 (1930); State v. St. Paul City Ry. Co., 117 Minn. 316, 135 N.W. 976 (1912); Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 187 N.W.

790, 28 A.L.R. 960 (1922); People ex rel. Harlem River & P.C.R. Co. v. State Board of Tax Com'rs, 215 N.Y. 507, 109 N.E. 569 (1915); Interurban Ry. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N.E. 831, 3 A.L.R. 696 (1918); Henry v. Bartlesville Gas & Oil Co., 1912 OK 569, 33 Okla. 473, 126 P. 725 (1912); Valley Rys. v. City of Harrisburg, 280 Pa. 385, 124 A. 644 (1924); Salt Lake City v. Utah Light & Traction Co., 52 Utah 210, 173 P. 556, 3 A.L.R. 715 (1918); Puget Sound Traction, Light & Power Co. v. Grassmeyer, 102 Wash. 482, 173 P. 504 (1918).
As to the revocation of franchises, generally, see Am. Jur. 2d, Franchises from Public Entities §§ 45 to 48.

[3] Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (applying the Contracts Clause and allowing an action under 42 U.S.C.A. § 1983); Superior Water, Light & Power Co. v. City of Superior, 263 U.S. 125, 44 S. Ct. 82, 68 L. Ed. 204 (1923); Northern Ohio Traction & Light Co. v. State of Ohio ex rel. Pontius, 245 U.S. 574, 38 S. Ct. 196, 62 L. Ed. 481 (1918); New York Electric Lines Co. v. Empire City Subway Co., 235 U.S. 179, 35 S. Ct. 72, 59 L. Ed. 184 (1914); Pine Bluff Corp. v. Toney, 96 Ark. 345, 131 S.W. 680 (1910); Lukrawka v. Spring Val. Water Co., 169 Cal. 318, 146 P. 640 (1915); City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960); City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944); Milwaukee Elec. Railway & Light Co. v. Railroad Commission of Wis., 153 Wis. 592, 142 N.W. 491 (1913).

[4] Grand Trunk Western R. Co. v. City of South Bend, 227 U.S. 544, 33 S. Ct. 303, 57 L. Ed. 633 (1913); City of Vandalia v. Postal Tel.-Cable Co., 274 Ill. 173, 113 N.E. 65 (1916); City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

a. In General

§ 191. Where grantee incurred significant expense

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 690

Where the exercise of the privilege granted involves considerable cost or expense, a grant to use the streets confers rights that may not be revoked at will, but only when required by public interest or convenience.[1] The permit or grant may not be revoked capriciously.[2]

Footnotes

1 Northern Ohio Traction & Light Co. v. State of Ohio ex rel. Pontius, 245 U.S. 574, 38 S. Ct. 196, 62 L. Ed. 481 (1918); Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913); Town of New Decatur v. American Tel. & Tel. Co., 176 Ala. 492, 58 So. 613 (1912); City of Vandalia v. Postal Tel.-Cable Co., 274 Ill. 173, 113 N.E. 65 (1916); City of Hagerstown v. Hagerstown Ry. Co. of Washington County, 123 Md. 183, 91 A. 170, 7 A.L.R. 1239 (1914).
As to revocation under the police power, see § 173.

2 Lincoln Safe Deposit Co. v. City of New York, 210 N.Y. 34, 103 N.E. 768 (1913).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

a. In General

§ 192. Estoppel to revoke grant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Estoppel 62

A public agency may be estopped to revoke or to deny authorization given by it to use a street or other way for a private purpose, if it has the power to authorize that use.[1] However, estoppel may not be predicated on the acceptance of compensation for the exercise of a privilege under a grant that provides for its revocation at any time.[2]

Footnotes

1 El Dorado County v. Al Tahoe Inv. Co., 175 Cal. App. 2d 407, 346 P.2d 205 (3d Dist. 1959); City of Hagerstown v. Hagerstown Ry. Co. of Washington County, 123 Md. 183, 91 A. 170, 7 A.L.R. 1239 (1914).

2 People ex rel. McCormick v. Western Cold Storage Co., 287 Ill. 612, 123 N.E. 43, 11 A.L.R. 437 (1919).

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IX. Use of Way

C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

b. Forfeiture

§ 193. Forfeiture of grant of special use of highway, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 690

The grant of a franchise or privilege to use the streets for special purposes may be made on conditions that, if not fulfilled by the grantee, create or justify a forfeiture.[1] Thus, a forfeiture may be declared for a failure to pave or repair the street as required by the franchise,[2] or for other acts of misuse or nonuse of its franchise.[3] A forfeiture for nonuse may occur, notwithstanding the fact that the failure to perform may not have been willful, or that the forfeiture may affect the rights of other municipalities.[4]

A forfeiture of rights and privileges that a public service company acquires in the streets of a city need not necessarily extend to the entire franchise.[5] The grant under which the company operates may authorize a forfeiture of the franchise to the extent it relates to unused portions of the streets, and in such a case, forfeiture of rights to all streets may not be warranted for failure to construct facilities on a portion of them.[6]

The insolvency or financial condition of a public service company is not necessarily of material importance in determining whether its franchise should be forfeited for failure to perform conditions of the franchise.[7]

Footnotes

[1] New York Electric Lines Co. v. Empire City Subway Co., 235 U.S. 179, 35 S. Ct. 72, 59 L. Ed. 184 (1914); State v. Birmingham Waterworks Co., 185 Ala. 388, 64 So. 23 (1913); Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923).
As to conditions on the use of streets, see §§ 177 to 181.

[2] Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923); Wheeling & E.G.R. Co. v. Town of Triadelphia, 58 W. Va. 487, 52 S.E. 499 (1905).

[3] New York Electric Lines Co. v. Empire City Subway Co., 235 U.S. 179, 35 S. Ct. 72, 59 L. Ed. 184 (1914).

[4] Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923).

[5] People ex rel. Hubbard v. Los Angeles Ry. Corp., 168 Cal. 406, 143 P. 739 (1914).

[6] People ex rel. Hubbard v. Los Angeles Ry. Corp., 168 Cal. 406, 143 P. 739 (1914).

[7] Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923).

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C. Special, Permissive, and Incidental Uses

3. Termination or Revocation

b. Forfeiture

§ 194. Manner of enforcing or preventing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 690

Where the provisions for forfeiture of a street franchise are not self-executing, proceedings must be taken to declare the forfeiture; otherwise the privileges under the franchise continue, notwithstanding the existence of grounds for forfeiture.[1] Resort to the courts to declare and enforce the forfeiture is allowed in this situation.[2] By the terms of the grant, notice to the company may be required before the forfeiture is declared, and in such a case, the notice given must be sufficient for the purpose.[3]

A public service company may obtain injunctive relief against the forfeiture of its franchise to operate in the streets.[4]

Footnotes

1 Green v. City of Mechanicville, 269 N.Y. 117, 199 N.E. 26, 102 A.L.R. 673 (1935).

2 Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923).

3 Sandstone Tp. v. Michigan Ry. Co., 198 Mich. 234, 164 N.W. 404 (1917) (notice ineffective).

4 People ex rel. Hubbard v. Los Angeles Ry. Corp., 168 Cal. 406, 143 P. 739 (1914); Wheeling & E.G.R. Co. v. Town of Triadelphia, 58 W. Va. 487, 52 S.E. 499 (1905).

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D. Particular Uses and Regulations

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West's Key Number Digest

West's Key Number Digest, Automobiles 58

West's Key Number Digest, Highways 167
West's Key Number Digest, Municipal Corporations 663(3), 680(1), 680(3) to 680(5), 680(7), 680(8), 681(4), 681(5), 703(1) to 703(5), 704

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West's A.L.R. Digest, Municipal Corporations 663(3), 680(1), 680(3) to 680(5), 680(7), 680(8), 681(4), 681(5), 703(1) to 703(5), 704

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IX. Use of Way

D. Particular Uses and Regulations

1. In General

§ 195. Unusual vehicles

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Highways 167

West's Key Number Digest, Municipal Corporations 703(5)

A.L.R. Library

Liability for damage to land or its occupants from dust, gases, odors, vibration, or the like, occasioned by defendant's continuous vehicular use of adjoining or nearby public highway, 25 A.L.R.4th 1192

The highway use of vehicles or machines of unusual construction or motive power is not necessarily illegal or a nuisance, but the right to use them depends on the nature of the particular vehicle and the frequency with which it uses the road.[1] Thus, the occasional use of the highway by a traction engine to pull cargo trailers or by a steam roller is generally regarded as lawful, provided due care is used in its operation.[2] The use of the highways by vehicles or machines of that character is subject to reasonable regulation by the controlling public authority.[3]

Municipalities, in the exercise of their general power to control the use of streets, may exclude from them, or restrict to particular streets, vehicles of such a character as to be likely to damage the surface of the street or to endanger or inconvenience other travelers.[4]

Footnotes

[1] Covington County v. Collins, 92 Miss. 330, 45 So. 854 (1908).

[2] Covington County v. Collins, 92 Miss. 330, 45 So. 854 (1908).

[3] Covington County v. Collins, 92 Miss. 330, 45 So. 854 (1908).

[4] People v. Rapini, 107 Colo. 363, 112 P.2d 551, 134 A.L.R. 545 (1941).
Expert testimony that the method of traction employed by a Sherman tank caused no more street damage than a conventional car or truck was not sufficient to show that a city ordinance prohibiting the operation of any vehicle unless it has tires of rubber or equally resilient material, with certain exceptions, lacked a real and substantial relation to the preservation of street surfaces. City of Cincinnati v. Welty, 64 Ohio St. 2d 28, 18 Ohio Op. 3d 211, 413 N.E.2d 1177 (1980).
As to traffic regulations that exclude certain vehicles from the road, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 232 to 238.

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D. Particular Uses and Regulations

1. In General

§ 196. Use of sidewalks

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 704

Forms

Am. Jur. Pleading and Practice Forms, Highways, Streets and Bridges § 272 (Complaint, petition, or declaration—To enjoin unreasonable use of sidewalk—Exhibition attracting large crowds obstructing access to neighboring business premises)

Sidewalks are ordinarily intended for the use of pedestrians, to the exclusion of animal and vehicular traffic.[1] City officials may have the authority to require that a sidewalk have a pedestrian barricade to block pedestrian traffic across a street.[2]

Observation:

A city ordinance, requiring owners of property adjoining sidewalks to keep the sidewalks in repair, did not exceed the scope of authority granted to the city by statute where the statute granted cities:[3]

• control over city streets and sidewalks

• the power to define and abate nuisances

• the authority to compel landowners to clean streets and walks adjacent to their properties

• the power to require landowners to construct a sidewalk in front of their premises

• the authority to regulate the use of sidewalks and require occupants of adjacent premises to keep sidewalks free of obstruction

A license to operate a newsstand may be denied, where the licensing authority's construction of the applicable city code provisions is rational.[4]

Regulation of the placement of news racks along sidewalks has been upheld, as promoting the government interests of protecting pedestrians' health, safety, and welfare and preserving aesthetics.[5] Similarly, a municipal ordinance that prohibited the use of portable tables on public sidewalks does not violate the First Amendment on its face, since the ordinance was valid when applied to nonexpressive conduct, and tables were not frequently used for expressive purposes, but such a ban violates the right to equal protection where the ordinance contained an exception for labor-related speech.[6]

Footnotes

1 Brunette v. Bierke, 271 Wis. 190, 72 N.W.2d 702 (1955).
As to liability for injury to persons using vehicles on sidewalks, see §§ 360 to 366.

2 475 Ninth Ave. Associates LLC v. Bloomberg, 2 Misc. 3d 597, 773 N.Y.S.2d 790 (Sup 2003).

3 Bonito Partners, LLC v. City of Flagstaff, 229 Ariz. 75, 270 P.3d 902 (Ct. App. Div. 1 2012).

4 Oh v. City of New York, 306 A.D.2d 25, 761 N.Y.S.2d 636 (1st Dep't 2003).

5 Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037 (9th Cir. 2002).

6 A.C.L.U. of Nevada v. City of Las Vegas, 466 F.3d 784 (9th Cir. 2006).
As to First Amendment concerns with regard to use of sidewalks, see Am. Jur. 2d, Constitutional Law § 547.

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D. Particular Uses and Regulations

1. In General

§ 197. Loitering or the like

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(3)

A.L.R. Library

Validity, construction, and application of loitering statutes and ordinances, 72 A.L.R.5th 1

Loitering on a public way in such a manner or to such an extent that it interferes with travelers constitutes a public nuisance.[1] Municipalities have the authority to prohibit the gathering or assembling of persons in the street or on the sidewalk in such a way as to interfere with or impede traffic, and statutes and ordinances making it an offense to be found loitering on the public streets, or to refuse to disperse or move on when ordered to do so by a police officer, have generally been upheld.[2]

Observation:

Restrictions imposed by the Secret Service prohibiting pedestrians from standing or congregating on public streets and sidewalks adjoining a city park within which a rally for the President of the United States was being held were narrowly tailored to serve significant governmental interests in protecting the President, and were upheld in the face of First Amendment challenges.[3]

A statute prohibiting obstruction of public streets must be narrowly tailored to meet a significant state interest.[4] A provision making it an offense to stand or loiter at street corners and other places, or to refuse to obey an order to disperse or move, regardless of the time of or the fact that the offender did not impede passage or interfere with the rights of others, is invalid.[5] Such a statute may not unreasonably or unnecessarily interfere with a person's freedom to move about or to stand still.[6] A statute or ordinance that purports to restrict such freedom must also contain standards that prevent arbitrary enforcement, and must be clear enough so that all persons subject to its penalties may know what acts to avoid.[7] The failure to obey instantly the order of a police officer to move does not render one who has casually met friends and stopped to converse with them on the sidewalk guilty of the offense of refusing to "disperse when commanded to do so by a police officer."[8]

Footnotes

1 Soles v. City of Vidalia, 92 Ga. App. 839, 90 S.E.2d 249 (1955).
As to statutes and ordinances prohibiting loitering, see Am. Jur. 2d, Vagrancy and Related Offenses §§ 3 to 11.

2 Shuttlesworth v. City of Birmingham, 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965); Jobson v. City of Huntington Beach, 462 F. Supp. 774 (C.D. Cal. 1978); State v. Sugarman, 126 Minn. 477, 148 N.W. 466 (1914); People v. Galpern, 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932); Tinsley v. City of Richmond, 202 Va. 707, 119 S.E.2d 488 (1961).
An ordinance that prohibited loitering by persons under "circumstances which justify suspicion that he or she may be engaged in or about to be engaged in a crime" was valid despite alleged vagueness, where the officer would have to have reasonable suspicion and the ordinance provided the accused with an opportunity to show a lawful purpose and justification for his or her conduct. Salt Lake City v. Savage, 541 P.2d 1035 (Utah 1975).

3 McCabe v. Macaulay, 515 F. Supp. 2d 944 (N.D. Iowa 2007), aff'd, 608 F.3d 1068 (8th Cir. 2010).
As to First Amendment concerns with regard to use of streets and sidewalks, see Am. Jur. 2d, Constitutional Law § 547.

4 Bischoff v. Florida, 242 F. Supp. 2d 1226 (M.D. Fla. 2003).

5 Price v. Tehan, 84 Conn. 164, 79 A. 68 (1911); Soles v. City of Vidalia, 92 Ga. App. 839, 90 S.E.2d 249 (1955); City of St. Louis v. Gloner, 210 Mo. 502, 109 S.W. 30 (1908); People v. Diaz, 4 N.Y.2d 469, 176 N.Y.S.2d 313, 151 N.E.2d 871 (1958).

6 Soles v. City of Vidalia, 92 Ga. App. 839, 90 S.E.2d 249 (1955); State v. Caez, 81 N.J. Super. 315, 195 A.2d 496 (App. Div. 1963).

7 Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); State v. Caez, 81 N.J. Super. 315, 195 A.2d 496 (App. Div. 1963).
A statute proscribing loitering in a public place with the intent to commit an act of prostitution provided adequate guidelines to preclude arbitrary enforcement in violation of due process; there was no constitutional problem in the inclusion in the statute of a list of acts that, by themselves, were innocuous, but which might be considered in determining whether the defendant possessed the requisite intent. People v. Pulliam, 62 Cal. App. 4th 1430, 73 Cal. Rptr. 2d 371 (4th Dist. 1998).

8 Price v. Tehan, 84 Conn. 164, 79 A. 68 (1911); People v. Carcel, 3 N.Y.2d 327, 165 N.Y.S.2d 113, 144 N.E.2d 81, 65 A.L.R.2d 1145 (1957).
Allegations that the defendant was standing with four other individuals on the sidewalk, was asked to move, and refused did not support a count of disorderly conduct. People v. DeJesus, 49 Misc. 3d 828, 16 N.Y.S.3d 718 (N.Y. City Crim. Ct. 2015).

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IX. Use of Way

D. Particular Uses and Regulations

1. In General

§ 198. Operation of public utilities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(4), 680(5)

A public authority may permit the use of streets and highways for the operation of public utilities, so long as this does not interfere with the ordinary use of the way by the public.[1] Highways and streets may be used for the purposes of:

- stringing transmission lines or wires[2]
- laying of pipes or conduits underground[3]
- operating commercial transportation facilities[4]

When determining the respective rights of public service corporations with respect to the occupation or crossing of highways, the rights of the public, as well as property rights, must be considered.[5]

Public authorities have the power to grant to cooperative or mutual utilities the right to use streets and highways for their apparatus and equipment.[6] The act under which a cooperative corporation in question is formed may confer on the corporation the right to construct its works across or along the public highways and streets.[7]

Footnotes

1 Burlington Gaslight Co. v. Burlington, C.R. & N. Ry. Co., 165 U.S. 370, 17 S. Ct. 359, 41 L. Ed. 749 (1897); Sundstrom v. Village of Oak Park, 374 Ill. 632, 30 N.E.2d 58, 131 A.L.R. 1465 (1940); Karcher v. Wheeling Electrical Co., 94 W. Va. 278, 118 S.E. 154, 30 A.L.R. 1044 (1923).
As to rights of abutting owners, see §§ 130 to 141.
As to granting franchises to use the street, see §§ 171 to 187
As to structures of public utilities as obstructions, see §§ 242 to 246.

2 §§ 217 to 222.

[3] § 215.

[4] §§ 223 to 226.

[5] Alt v. State, 88 Neb. 259, 129 N.W. 432 (1911).

[6] Alabama Power Co. v. Cullman County Electric Membership Corporation, 234 Ala. 396, 174 So. 866 (1937), opinion adhered to on reh'g, 235 Ala. 694, 178 So. 919 (1938).

[7] Illinois Pipe Line Co. v. Indiana Statewide Rural Elec. Membership Corp., 107 Ind. App. 372, 24 N.E.2d 805 (1940); Northern Kentucky Mut. Telephone Co. v. Bracken County, 220 Ky. 297, 295 S.W. 146 (1927); State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).

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D. Particular Uses and Regulations

1. In General

§ 199. Trees and shrubs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 663(3)

The maintenance of trees within the limits of a street or highway for the purpose of ornamentation and shade is a proper street or highway use.[1] The trees thus maintained are a part of the way, to be enjoyed and used by the traveling public.[2]

Abutting property owners may plant and maintain trees and shrubs within the limits of the right-of-way, at least to the extent the trees and shrubs do not constitute an impediment to travel or a danger to travelers.[3]

Footnotes

1 Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543 (1932).

2 Donahue v. Keystone Gas Co., 181 N.Y. 313, 73 N.E. 1108 (1905).

3 Cartwright v. Liberty Telephone Co., 205 Mo. 126, 103 S.W. 982 (1907); Stocking v. City of Lincoln, 93 Neb. 798, 142 N.W. 104 (1913) (overruled in part on other grounds by, Weibel v. City of Beatrice, 163 Neb. 183, 79 N.W.2d 67 (1956)).
As to remedies for damage to the trees, see § 202.

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2. Moving Buildings

§ 200. Use of highways for moving buildings, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(1)

A.L.R. Library

Validity, construction, and application of statutes or other regulations affecting the moving of buildings on highways, 83 A.L.R.2d 464

Some courts hold that in the absence of any legislative restriction by statute or ordinance, an individual has a common-law right to the reasonable use of streets for the purpose of moving buildings,[1] although at least one court has held that the consent of the public authorities is essential.[2] In any event, the use of a highway for this purpose is an unusual or extraordinary use.[3]

Although at least one court has held to the contrary,[4] there is authority that a municipality may entirely prohibit the use of its streets for the moving of buildings, at least in populous districts.[5] There is agreement that a municipality may authorize this use of the public streets, subject to reasonable regulations[6] and under such restrictions as will safeguard the rights of the public.[7] For example, a municipality may require that the party seeking to move a building on a street obtain a license or permit,[8] or indemnify the municipality for damages.[9] The municipality may also require that a reasonable fee be paid, as a condition precedent to issuing a permit to move a building through the streets.[10]

A municipality may revoke a permit to move a building, if it is being improperly used.[11]

Footnotes

[1] Missouri Pac. Ry. Co. v. Sproul, 99 Kan. 608, 162 P. 293 (1917); Hinman v. Clarke, 121 A.D. 105, 105 N.Y.S. 725 (4th Dep't 1907), aff'd, 193 N.Y. 640, 86 N.E. 1125 (1908); Weeks v. Carolina Telephone & Telegraph Co., 168 N.C. 468, 84 S.E. 812 (1915).

[2] Edison Elec. Light & Power Co. of St. Paul v. Bloomquist, 110 Minn. 163, 124 N.W. 969 (1910), aff'd on reh'g, 110 Minn. 163, 125 N.W. 895 (1910).

[3] Missouri Pac. Ry. Co. v. Sproul, 99 Kan. 608, 162 P. 293 (1917); Kibbie Telephone Co. v. Landphere, 151 Mich. 309, 115 N.W. 244 (1908); Collar v. Bingham Lake Rural Telephone Co., 132 Minn. 110, 155 N.W. 1075 (1916); Northwestern Telephone Exch. Co. v. Anderson, 12 N.D. 585, 98 N.W. 706 (1904).

[4] Evans v. King, 57 S.D. 109, 230 N.W. 848 (1930).

[5] Edison Elec. Light & Power Co. of St. Paul v. Blomquist, 185 F. 615 (C.C.D. Minn. 1911); Indiana R. Co. v. Calvert, 168 Ind. 321, 80 N.E. 961 (1907).

[6] Wilson v. Eureka City, 173 U.S. 32, 19 S. Ct. 317, 43 L. Ed. 603 (1899); Indiana R. Co. v. Calvert, 168 Ind. 321, 80 N.E. 961 (1907); Edison Elec. Light & Power Co. of St. Paul v. Bloomquist, 110 Minn. 163, 124 N.W. 969 (1910), aff'd on reh'g, 110 Minn. 163, 125 N.W. 895 (1910); State v. Phillips, 133 Neb. 209, 274 N.W. 459, 111 A.L.R. 1431 (1937).

[7] Northwestern Telephone Exch. Co. v. Anderson, 12 N.D. 585, 98 N.W. 706 (1904).

[8] Wilson v. Eureka City, 173 U.S. 32, 19 S. Ct. 317, 43 L. Ed. 603 (1899); Indiana R. Co. v. Calvert, 168 Ind. 321, 80 N.E. 961 (1907); Edison Elec. Light & Power Co. of St. Paul v. Bloomquist, 110 Minn. 163, 124 N.W. 969 (1910), aff'd on reh'g, 110 Minn. 163, 125 N.W. 895 (1910); Smith v. Southwestern Bell Tel. Co., 1960 OK 27, 349 P.2d 646, 83 A.L.R.2d 454 (Okla. 1960); State ex rel. Hermann v. Madison Gas & Elec. Co., 264 Wis. 31, 58 N.W.2d 522 (1953).

[9] Edison Elec. Light & Power Co. of St. Paul v. Bloomquist, 110 Minn. 163, 124 N.W. 969 (1910), aff'd on reh'g, 110 Minn. 163, 125 N.W. 895 (1910); State v. Phillips, 133 Neb. 209, 274 N.W. 459, 111 A.L.R. 1431 (1937); Northwestern Telephone Exch. Co. v. Anderson, 12 N.D. 585, 98 N.W. 706 (1904).

[10] State v. Phillips, 133 Neb. 209, 274 N.W. 459, 111 A.L.R. 1431 (1937).

[11] Hickok v. City of Mt. Vernon, 145 A.D. 599, 130 N.Y.S. 254 (2d Dep't 1911).

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IX. Use of Way

D. Particular Uses and Regulations

2. Moving Buildings

§ 201. Interference with wires

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(1)

A.L.R. Library

Validity, construction, and application of statutes or other regulations affecting the moving of buildings on highways, 83 A.L.R.2d 464

In the absence of express legislative authority, a person moving a building in a street does not have the right to interfere with wires that are lawfully there.[1] The mere granting of a permit allowing moving a building along the streets does not authorize interference with the wires.[2] An injunction will prevent moving a building along a street where it would require cutting, removing, or destroying the wires of a telephone company.[3]

The failure to obtain a permit to move a building through the streets does not preclude recovery for personal injuries sustained by a mover because of the negligence of the owner of wires strung over a street,[4] but a violation of a provision stating that only competent and experienced workers should adjust wires to allow the passage of a building precludes recovery for the ensuing injuries.[5]

Footnotes

[1] Fort Madison Street Ry. Co. v. Hughes, 137 Iowa 122, 114 N.W. 10 (1907); Kibbie Telephone Co. v. Landphere, 151 Mich. 309, 115 N.W. 244 (1908); Edison Elec. Light & Power Co. of St. Paul v. Bloomquist, 110 Minn. 163, 124

N.W. 969 (1910), aff'd on reh'g, 110 Minn. 163, 125 N.W. 895 (1910); Northwestern Telephone Exch. Co. v. Anderson, 12 N.D. 585, 98 N.W. 706 (1904).

[2] Edison Elec. Light & Power Co. of St. Paul v. Bloomquist, 110 Minn. 163, 124 N.W. 969 (1910), aff'd on reh'g, 110 Minn. 163, 125 N.W. 895 (1910).

[3] Kibbie Telephone Co. v. Landphere, 151 Mich. 309, 115 N.W. 244 (1908).

[4] Winegarner v. Edison Light & Power Co., 83 Kan. 67, 109 P. 778 (1910).

[5] Smith v. Southwestern Bell Tel. Co., 1960 OK 27, 349 P.2d 646, 83 A.L.R.2d 454 (Okla. 1960).

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2. Moving Buildings

§ 202. Damage to trees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(1)

A.L.R. Library

Validity, construction, and application of statutes or other regulations affecting the moving of buildings on highways, 83 A.L.R.2d 464

Permission to move a building through the streets does not necessarily authorize the cutting or removal of trees.[1] Further, public authorities do not have the right to trim trees for the purpose of aiding the move.[2]

Footnotes

1 Hickok v. City of Mt. Vernon, 145 A.D. 599, 130 N.Y.S. 254 (2d Dep't 1911).

2 Commonwealth v. Byard, 200 Mass. 175, 86 N.E. 285 (1908).
As to remedies for damage to the trees, see § 202.

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IX. Use of Way

D. Particular Uses and Regulations

3. Assemblies and Free Expression

§ 203. Use of highways for assemblies and free expression, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(1)

Generally, a street will be considered a traditional "public forum" in which government entities are strictly limited in their ability to regulate private speech.[1] Streets are proper places for the exercise of the freedom of communicating information and disseminating ideas, and a community does not have the absolute power to prohibit the use of its streets for communication.[2] The police power does not justify an ordinance that requires a permit for a public assembly on public streets, and gives an official the discretion to refuse it based on the official's belief that it is proper to do so,[3] and such an ordinance is unconstitutional on its face if it grants overly broad discretion to the licensing authority, not reasonably related to the proper regulation of the streets.[4] However, freedom of speech on public streets may yield to police regulations when a clear and present danger of riot, disorder, interference with traffic, or other immediate threat to public safety, peace, or order appears.[5] Thus, while the rights of free speech and assembly do not give a group of demonstrators the right to cordon off a street, a statute or practice that allows local officials unfettered discretion to regulate the use of the streets for peaceful meetings is an unwarranted abridgment of the First Amendment freedoms of speech and assembly.[6] Appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that the limited discretion is exercised with uniformity on the facts of each application, free from improper or inappropriate considerations and from unfair discrimination, and with a systematic, consistent, and just order of treatment, with reference to the convenience of public use of the highways.[7]

In the absence of specific legislative authorization, an ordinance that vests in a public officer or body an arbitrary discretion with respect to granting or refusing of such a permit without regard to the nature or purpose of the meeting or its effect on traffic is unreasonable and void.[8] On the other hand, the obstruction of a street by assembling a crowd without permission from the proper public authority constitutes a nuisance,[9] and a municipality does not have the power, without legislative authority, to permit such an obstruction.[10]

Footnotes

1 Service Employees Intern. Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010).

2 Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R.2d 608 (1949).
As to the regulation of advertising on the streets by means of voice or loudspeakers, see Am. Jur. 2d, Advertising § 20.
As to the constitutionality of legislative limitations on freedom of speech, generally, see Am. Jur. 2d, Constitutional Law § 514.
As to First Amendment concerns with regard to use of public streets and sidewalks, see Am. Jur. 2d, Constitutional Law § 547.

3 Hague v. Committee for Indus. Organization, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

4 City of Oakwood v. Gummer, 38 Ohio St. 2d 164, 67 Ohio Op. 2d 179, 311 N.E.2d 517 (1974).

5 Feiner v. New York, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295 (1951); Cantwell v. State of Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940).
A person using sidewalks for stopping pedestrians and soliciting them to join an organization may become a public nuisance and create such an obstruction to traffic as to subject him or her to arrest under the applicable city ordinance. Pittman v. Nix, 152 Fla. 378, 11 So. 2d 791, 144 A.L.R. 1341 (1943).

6 Cox v. State of Louisiana, 379 U.S. 536, 85 S. Ct. 466, 13 L. Ed. 2d 487 (1965).

7 Cox v. State of Louisiana, 379 U.S. 536, 85 S. Ct. 466, 13 L. Ed. 2d 487 (1965).
A city ordinance making it an offense to participate in a parade, procession, or other public demonstration without first obtaining a permit from the city commission, and authorizing commission members to refuse the permit if required by the "public welfare, peace, safety, health, decency, good order, morals, or convenience" is unconstitutional because it subjects the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority. Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969).

8 Anderson v. Tedford, 80 Fla. 376, 85 So. 673, 10 A.L.R. 1481 (1920).

9 Com. v. Surridge, 265 Mass. 425, 164 N.E. 480, 62 A.L.R. 402 (1929); People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950), aff'd, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295 (1951).

10 Com. v. Surridge, 265 Mass. 425, 164 N.E. 480, 62 A.L.R. 402 (1929).

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IX. Use of Way

D. Particular Uses and Regulations

3. Assemblies and Free Expression

§ 204. Religious purposes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(1)

Religious groups may be required to obtain a permit to conduct meetings,[1] or to solicit charitable contributions in the streets,[2] but an ordinance that makes it unlawful to hold public worship meetings on the streets without first obtaining a permit from an administrative official, but permits the official to exercise discretion in denying permit applications on the ground that, in the official's opinion, an applicant's past conduct violated provisions of an ordinance making it a criminal offense to ridicule or denounce any form of religious belief, is invalid as a prior restraint on the exercise of First Amendment rights as embodied in the Fourteenth Amendment.[3]

Members of a religious sect are entitled to walk along the streets and sidewalks of a municipality carrying placards relating to their religion and distributing pamphlets and disseminating information on that subject, so long as they do not commit acts tending to be a breach of the peace or obstruction of the public ways.[4] A municipal ordinance forbidding the distribution on city streets of handbills containing an invitation to participate in a religious activity violates the constitutional guarantee of religious freedom.[5]

Footnotes

1 People on Complaint of O'Connor v. Smith, 263 N.Y. 255, 188 N.E. 745 (1934).

2 State v. Hundley, 195 N.C. 377, 142 S.E. 330, 57 A.L.R. 506 (1928).
As to the sale of religious pamphlets, see § 213.

3 Kunz v. People of State of New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951).
Permissible governmental regulation of religious activities is discussed in Am. Jur. 2d, Constitutional Law § 446.
As to use of public property by religious organizations, see Am. Jur. 2d, Constitutional Law § 451.

As to the erection, maintenance, or display of religious symbols on public property, see Am. Jur. 2d, Constitutional Law § 452.
As to requirements that religious organizations obtain permits to use the streets, see Am. Jur. 2d, Constitutional Law § 456.

4 People v. Kieran, 6 Misc. 2d 245, 26 N.Y.S.2d 291 (County Ct. 1940).

5 Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241, 175 A.L.R. 430 (1946).

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IX. Use of Way

D. Particular Uses and Regulations

4. Parades, Amusements, or Sports

§ 205. Parades

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(2)

A.L.R. Library

Validity, construction, and application of state or local enactments regulating parades, 80 A.L.R.5th 255

The right to parade in a peaceable manner and for a lawful purpose is a fundamental right,[1] but parades in the streets are subject to governmental regulation and limitation.[2] Public authorities may prohibit parades only to the extent they may actually constitute a nuisance.[3] While a parade permit may not be denied because the onlookers will riot,[4] a city may bar parades under certain circumstances, where public safety so requires.[5]

A regulation of the use of the streets for parades is a traditional exercise of control by local government,[6] And such a regulation is invalid if it vests in the designated official or authority an unregulated and arbitrary discretion with respect to granting or refusing permission.[7] To be valid, the regulations must be reasonable in their requirements and not oppressive in their operation, and must expressly and with reasonable definiteness fix the conditions on which all persons or associations may use the public streets, and their provisions must operate generally and impartially with regard to all of the same class.[8] A municipality may consider, without unfair discrimination, the time, place, and manner of use, in relation to other proper uses of the streets.[9] For example, a city code establishing a permit scheme for parades was not subject-matter censorship but a content-neutral time, place, and manner regulation of the use of a public forum, where:[10]

- the code did not authorize those reviewing applications to pass judgment on the content of any speech
- none of the grounds for denying a permit had anything to do with content

• the code was not limited to communicative activity

Regulations requiring parade permits are justified as a traditional exercise of control by local governments, and are valid so long as they do not vest unbridled discretion in the decision maker.[11] Requirements that persons intending to conduct a parade give a certain amount of notice to public officials have been invalidated as not being narrowly tailored[12] or as constituting an impermissible prior restraint on protected expression.[13] However, an ordinance barring downtown parades for all but two one-hour periods a day on weekdays has been held invalid.[14]

The requirement that parade organizers pay a fee is valid, except to the extent that it is more than the city's actual overtime costs for traffic control and cleaning.[15]

A restriction on the size of signs in one picketing ordinance was narrowly tailored to the city's legitimate governmental interest in traffic safety and did not substantially burden First Amendment speech rights.[16] However, another court considered such a restriction to be a "heckler's veto," where there was no valid basis for the argument that the particular requirement was the least restrictive alternative available to meet the goals of free pedestrian traffic, unobstructed views by the parade audience, and public safety.[17]

Footnotes

1 People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908); Jefferson & Indiana Coal Co. v. Marks, 287 Pa. 171, 134 A. 430, 47 A.L.R. 745 (1926); City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961); Shields v. State, 187 Wis. 448, 204 N.W. 486, 40 A.L.R. 945 (1925).

2 Com. v. Frishman, 235 Mass. 449, 126 N.E. 838, 9 A.L.R. 549 (1920); People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908); City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961); York v. City of Danville, 207 Va. 665, 152 S.E.2d 259 (1967); Shields v. State, 187 Wis. 448, 204 N.W. 486, 40 A.L.R. 945 (1925).

3 People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908).

4 Church of American Knights of Ku Klux Klan v. City of Gary, Indiana, 334 F.3d 676 (7th Cir. 2003).

5 Coalition to Protest Democratic Nat. Convention v. City of Boston, 327 F. Supp. 2d 61 (D. Mass. 2004), aff'd, 378 F.3d 8 (1st Cir. 2004) (complete ban on parades on a sidewalk while a political convention was being held in an arena across the street was justified where the heightened risk of security problems arising from the convention itself would have stressed the public safety system to its limit; however the ban on the day prior to the convention was not justified).

A ban on "new" parades, which had not been held on a particular avenue prior to the promulgation of the rules, to limit the number of parades and congestion on that avenue, was content neutral and not excessive; however, the implementation of the ordinance demonstrated that city officials had exercised overly broad discretion to grant exceptions to the ban, in violation of the First Amendment, even though the ordinance sufficiently defined "occasions of extraordinary public interest" for which exceptions were permitted. International Action Center v. City of New York, 522 F. Supp. 2d 679 (S.D. N.Y. 2007), judgment aff'd, 587 F.3d 521 (2d Cir. 2009).

6 Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

A group of 15 to 20 persons marching along a sidewalk in single file carrying signs and placards constitutes a "parade or procession" on a public street within the meaning of a state statute requiring persons so using the streets to obtain a special license. Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

7 N.A.A.C.P., Western Region v. City of Richmond, 743 F.2d 1346 (9th Cir. 1984); York v. City of Danville, 207 Va. 665, 152 S.E.2d 259 (1967).

8 Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941); City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961); York v. City of Danville, 207 Va. 665, 152 S.E.2d 259 (1967); Shields v. State, 187 Wis. 448, 204 N.W. 486, 40 A.L.R. 945 (1925).

A small group exception to a picketing ordinance was valid, even though the ordinance applied to a group of 11 picketers. Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008).

A school zone ordinance, which prohibited "street activity" and "parades" within school zones during designated

times, with a "wingspan" exception for people gathered or walking who are at least an arm's length apart from each other, was not narrowly tailored, since the wingspan exception would allow a thousand soldiers to march down the sidewalk if they kept the requisite distance from each other, while the ordinance would criminalize the actions of a few people holding signs while standing next to each other, and the ordinance swept far more broadly than was necessary to further the city's legitimate concern of enhancing the safety and welfare of schoolchildren and others using public rights-of-way; also, exceptions for funeral processions, students going to and from classes, and a governmental agency acting within the scope of its functions were not consistent with the ordinance's goal of promoting traffic safety. Knowles v. City of Waco, Tex., 462 F.3d 430 (5th Cir. 2006).

[9] Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).
As to First Amendment considerations with regard to regulation of the time, place and manner of a parade, see Am. Jur. 2d, Constitutional Law § 530.

[10] Yates v. Norwood, 841 F. Supp. 2d 934 (E.D. Va. 2012).

[11] Reyes v. City of Lynchburg, 300 F.3d 449 (4th Cir. 2002).
A city ordinance governing parade permits was valid, where, to deny a permit, the police commissioner was required to find substantial interference with traffic, insufficient availability of police, and congestion sufficient to interfere with fire, police, and ambulance service, and the ordinance was narrowly tailored to meet valid traffic and safety concerns, by requiring an individual assessment of each situation. MacDonald v. City of Chicago, 243 F.3d 1021 (7th Cir. 2001).

[12] Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir. 2007) (30 days' notice); American-Arab Anti-Discrimination Committee v. City of Dearborn, 418 F.3d 600 (6th Cir. 2005) (same); Service Employee Intern. Union v. City of Los Angeles, 114 F. Supp. 2d 966 (C.D. Cal. 2000) (40 days).

[13] Service Employees Intern. Union v. City of Houston, 542 F. Supp. 2d 617 (S.D. Tex. 2008), aff'd in part, rev'd in part on other grounds and remanded, 595 F.3d 588 (5th Cir. 2010) (10-days' notice).

[14] Service Employees Intern. Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010).

[15] Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir. 2007) (also rejecting several equal protection claims).

[16] Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008).

[17] Michael v. City of Granite City, Ill., 500 F. Supp. 2d 1039 (S.D. Ill. 2007).

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D. Particular Uses and Regulations

4. Parades, Amusements, or Sports

§ 206. Street performers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 703(2)

In the case of street performers, it has been recognized that while a city is entitled to regulate pedestrian traffic, the city has the burden of showing that its regulation on expression is not substantially broader than necessary to achieve the government's interests.[1] An ordinance prohibiting street performances in a particular district may be adequately tailored to serve the justifications of crowd and traffic control.[2]

Footnotes

1 State v. O'Daniels, 911 So. 2d 247 (Fla. 3d DCA 2005).

2 Horton v. City of St. Augustine, Fla., 272 F.3d 1318 (11th Cir. 2001).

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4. Parades, Amusements, or Sports

§ 207. Sports and games

Topic Summary | Correlation Table | References

West's Key Number Digest

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The use of streets for games, sports, and play is not necessarily improper, in the absence of any prohibitory regulation.[1] Coasting in the street is generally not considered a nuisance per se.[2] The use of sidewalks for roller skating is generally deemed proper.[3]

The use of highways and streets for play or sports may be prohibited or regulated by the public authorities.[4] While a group bicycle tour may constitute "expressive activity," covered by the First Amendment, the imposition of a permit requirement on bicyclists planning to travel in groups of 50 or more may be narrowly tailored to advance compelling government traffic control and safety interests.[5] On the other hand, a charge that bicyclists were parading without a permit will not be sustained, where the only activity named in either the parading law or police department rules that explicitly referred to bicycles was a "bicycle race," but it was alleged that the bicyclists were riding slowly; also, the bicyclists were not participating in a motorcade, caravan or promenade, and there was no allegation that the bicyclists were participating in events that were either organized or formal, as required for a march, parade or procession.[6]

Footnotes

1 Sedita v. Steinberg, 105 Conn. 1, 134 A. 243, 49 A.L.R. 154 (1926); Harris v. City of Des Moines, 202 Iowa 53, 209 N.W. 454, 46 A.L.R. 1429 (1926); Morris v. Mills, 121 S.C. 200, 113 S.E. 632, 36 A.L.R. 302 (1922).

2 Harris v. City of Des Moines, 202 Iowa 53, 209 N.W. 454, 46 A.L.R. 1429 (1926); Lynch v. Public Service Corp., 82 N.J.L. 712, 83 A. 382 (N.J. Ct. Err. & App. 1912); Idell v. Day, 273 Pa. 34, 116 A. 506, 20 A.L.R. 1429 (1922).

3 Muller v. Hillenbrand, 227 N.Y. 448, 125 N.E. 808, 8 A.L.R. 1455 (1920).

[4] Shea v. Pilette, 108 Vt. 446, 189 A. 154, 109 A.L.R. 933 (1937).
As to the temporary closing of a street to permit its use for purposes of sport or entertainment, see § 98.

[5] Five Borough Bicycle Club v. City of New York, 483 F. Supp. 2d 351 (S.D. N.Y. 2007), judgment aff'd, 308 Fed. Appx. 511 (2d Cir. 2009) (noting that approval was automatic except when specified exceptions were involved, and the police department was required to make reasonable efforts to accommodate the group when the requested route was not available).

[6] People v. Barrett, 13 Misc. 3d 929, 821 N.Y.S.2d 416 (N.Y. City Crim. Ct. 2006).

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IX. Use of Way

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4. Parades, Amusements, or Sports

§ 208. Automobile racing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(3), 703(4)

Authority conferred on a municipality to regulate the use of its streets and the speed of vehicles does not give it any right to grant permission for automobile racing in its streets, and in the absence of a valid legislative grant of authority for that purpose, the racing of vehicles in a street is an unlawful use and obstruction of the street and a nuisance per se.[1] However, in some instances, statutory authority has been conferred to issue permits for automobile racing in the streets.[2] Where a permit has been properly granted for holding an automobile race on a public highway, the race does not constitute such a public nuisance as may be enjoined by a public prosecution, but a race held over an unprotected course constitutes a nuisance as to those persons particularly affected.[3]

Footnotes

1 Bogart v. City of New York, 200 N.Y. 379, 93 N.E. 937 (1911).

2 Saari v. State, 203 Misc. 859, 119 N.Y.S.2d 507 (Ct. Cl. 1953), judgment aff'd, 282 A.D. 526, 125 N.Y.S.2d 507 (3d Dep't 1953).

3 Saari v. State, 203 Misc. 859, 119 N.Y.S.2d 507 (Ct. Cl. 1953), judgment aff'd, 282 A.D. 526, 125 N.Y.S.2d 507 (3d Dep't 1953).

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§ 209. Use of highways for business purposes, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(8)

Individuals do not have the inherent right to conduct their private businesses in the streets,[1] nor may they acquire a vested right to use the streets for conducting a commercial business.[2] In any event, they may not conduct business in the public streets to the annoyance of the public, or monopolize the street or walk.[3]

Footnotes

1 Clem v. City of La Grange, 169 Ga. 51, 149 S.E. 638, 65 A.L.R. 1361 (1929); Territory of Hawaii v. Scruggs, 43 Haw. 71, 1958 WL 9949 (1958); Terrell v. Tracy, 312 Ky. 631, 229 S.W.2d 433 (1950); Atlantic Greyhound Corp. v. North Carolina Utilities Commission, 229 N.C. 31, 47 S.E.2d 473 (1948); Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965).

2 City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695, 154 A.L.R. 1434 (1944).

3 Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 58 A. 21 (1904); Mackenzie v. Frank M. Pauli Co., 207 Mich. 456, 174 N.W. 161, 6 A.L.R. 1305 (1919); Dougherty v. City of St. Louis, 251 Mo. 514, 158 S.W. 326 (1913); Chapman v. City of Lincoln, 84 Neb. 534, 121 N.W. 596 (1909); Busse v. Rogers, 120 Wis. 443, 98 N.W. 219 (1904).

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5. Business Purposes

§ 210. Municipal power to prohibit or regulate

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(8), 703(1)

The use of public streets as a place to conduct a private business is generally recognized as a special or extraordinary use, which the controlling public authority may prohibit or regulate as it deems proper.[1] A municipality's power to regulate the use of streets for private gain is to be liberally construed.[2] The purpose of these regulations is to promote public safety, and not to regulate and control indirectly the user's business itself.[3]

A municipality's authority to prohibit the use of the streets by any citizen or corporation conducting a legitimate business is limited to the proper exercise of the police power.[4] Any arbitrary and unreasonable refusal by municipal officials to permit the use of its streets for business purposes will not be upheld.[5] The stifling of competition through an exercise of the police power is never justifiable, except if done in the public interest.[6]

Footnotes

1 Stephenson v. Binford, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932); Hodge Drive-It-Yourself Co. v. City of Cincinnati, 284 U.S. 335, 52 S. Ct. 144, 76 L. Ed. 323 (1932); Ex parte Cardinal, 170 Cal. 519, 150 P. 348 (1915); Pittman v. Nix, 152 Fla. 378, 11 So. 2d 791, 144 A.L.R. 1341 (1943); Clem v. City of La Grange, 169 Ga. 51, 149 S.E. 638, 65 A.L.R. 1361 (1929); Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200, 169 N.E. 22, 66 A.L.R. 834 (1929); Louisville Taxicab & Transfer Co. v. Blanton, 305 Ky. 179, 202 S.W.2d 433, 175 A.L.R. 1329 (1947); People of City of Dearborn v. Dmytro, 280 Mich. 82, 273 N.W. 400, 111 A.L.R. 128 (1937); Collins-Dietz-Morris Co. v. State Corp. Com'n, 1931 OK 301, 154 Okla. 121, 7 P.2d 123, 80 A.L.R. 561 (1931); Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948); Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).
As to use of a street for particular business purposes as constituting an unlawful obstruction, see §§ 242, 253.

[2] People of City of Dearborn v. Dmytro, 280 Mich. 82, 273 N.W. 400, 111 A.L.R. 128 (1937).

[3] Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).

[4] City and County of Denver v. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (1952).

[5] City and County of Denver v. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (1952).

[6] Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).

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5. Business Purposes

§ 211. Permits to use street for private business

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(8)

Because a permit allowing private individuals to have exclusive possession of the street surface for a private business use is beyond the ordinary authority of a municipality, it may not issue such a permit in the absence of special enabling state legislation.[1] Assuming that this power exists, granting permission to a private person to use the streets in this manner is totally within the municipality's discretion.[2]

Footnotes

1 Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965).

2 Baxter-Wyckoff Co. v. City of Seattle, 67 Wash. 2d 555, 408 P.2d 1012 (1965).

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§ 212. Sale of merchandise

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(8), 703(1)

A.L.R. Library

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose, 14 A.L.R.3d 896

Under the powers ordinarily granted to control streets, as well as to regulate peddlers and enforce other police regulations, municipalities have the power to regulate or prohibit sales of merchandise in their streets, sidewalks, or other public ways.[1] However, such regulations are subject to the constitutional requirement that the regulation or prohibition may not be arbitrary, discriminatory, unreasonable, or unduly oppressive.[2]

Observation:

Some courts hold that ordinances prohibiting public selling are invalid on the basis that the power to prohibit may not be implied from legislation conferring the power to regulate.[3]

If the state has expressly or impliedly recognized the legitimacy of those activities, a municipality does not have the power to prohibit the sale of merchandise on its streets, and must limit itself to reasonable regulation.[4]

Footnotes

1 State ex rel. Hough v. Woodruff, 147 Fla. 299, 2 So. 2d 577 (1941); Good Humor Corp. v. Village of Mundelein, 33 Ill. 2d 252, 211 N.E.2d 269, 14 A.L.R.3d 887 (1965); Com. v. Fox, 218 Mass. 498, 106 N.E. 137 (1914).
As to markets, stalls, or stands in the public way, see § 242.

2 Lindsay v. City of Philadelphia, 863 F. Supp. 220 (E.D. Pa. 1994); San Francisco Street Artists Guild v. Scott, 37 Cal. App. 3d 667, 112 Cal. Rptr. 502 (1st Dist. 1974); Hord v. City of Fort Myers, 153 Fla. 99, 13 So. 2d 809 (1943); Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99, 453 P.2d 82 (1969); People of City of Dearborn v. Dmytro, 280 Mich. 82, 273 N.W. 400, 111 A.L.R. 128 (1937); Fanelli v. City of Trenton, 135 N.J. 582, 641 A.2d 541 (1994); Good Humor Corporation v. City of New York, 290 N.Y. 312, 49 N.E.2d 153 (1943).
A municipal ordinance prohibiting the use of the public streets for the purpose of furnishing curb service, defined by the ordinance as the use of the streets by one engaged in business for the sale or solicitation of sales of goods, wares, or merchandise, is, in view of the implied limitation of its application to business districts where traffic is likely to be congested, not arbitrary. People of City of Dearborn v. Dmytro, 280 Mich. 82, 273 N.W. 400, 111 A.L.R. 128 (1937).

3 Good Humor Corporation v. City of New York, 290 N.Y. 312, 49 N.E.2d 153 (1943); State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

4 Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

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§ 213. Sale of merchandise—Regulation of sale of specific articles or location or time of sale

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(8), 703(1)

A.L.R. Library

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose, 14 A.L.R.3d 896

Forms

Am. Jur. Pleading and Practice Forms, Highways, Streets and Bridges § 273 (Complaint, petition, or declaration—To enjoin maintenance of portable food-vending cart in front of plaintiff's premises—Obstruction of ingress and egress)

Where a municipality has the power to regulate or prohibit the sale of merchandise on its streets, sidewalks, or other public places, this power includes the power to regulate or prohibit the sale of specific articles,[1] and to regulate or prohibit sales in defined sections or streets of the municipality[2] or during specifically defined periods,[3] provided that the regulation or prohibition is reasonable and not discriminatory.[4] For instance, a content-neutral ordinance that prohibits street vendors from soliciting within the roadway at intersections with traffic signals, but allows solicitation on surrounding sidewalks and unpaved shoulders, was valid and narrowly tailored, in that it addressed activity at the most heavily trafficked and most dangerous intersections, and served a compelling public interest in public safety.[5] The power may be exercised not only with respect to the use of public streets for the sale of merchandise,[6] food,[7] and newspapers and magazines,[8] but also with respect

to the use of the streets for advertising those goods.[9]

Ordinances restricting public selling may not be applied so as to limit the sale of religious pamphlets or similar literature protected by the constitutional guarantees of free speech and religion.[10] However, the mere fact that a municipality permits its sidewalks to be used for charitable projects does not require that it also permit their use for selling one's own goods.[11]

Since a sidewalk vendor does not have a constitutionally protected property right to operate a cart at a customary location, a revised licensing ordinance denying the right at that location does not violate the vendor's due process rights.[12] A city vending ordinance granting vendors who operated at a particular location prior to the adoption of the ordinance an opportunity for first preference to continue their operation did not entitle a sidewalk vendor to continue the operation at the vendor's customary site, where the ordinance expressly conditioned the right to "first preference" on the designation of the particular location as a permitted site, and the vendor's customary site was not so designated.[13]

Footnotes

1 City of Chicago v. Rhine, 363 Ill. 619, 2 N.E.2d 905, 105 A.L.R. 1045 (1936); Collis v. Town of Niskayuna, 178 A.D.2d 868, 577 N.Y.S.2d 919 (3d Dep't 1991); Hixon v. State, 523 S.W.2d 711 (Tex. Crim. App. 1975); Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 9 A.L.R.2d 712 (1949).

2 Lindsay v. City of Philadelphia, 844 F. Supp. 229 (E.D. Pa. 1994); City of Chicago v. Rhine, 363 Ill. 619, 2 N.E.2d 905, 105 A.L.R. 1045 (1936); Com. v. Gulden, 369 Mass. 965, 341 N.E.2d 262 (1976); Piane v. Town of Conway, 118 N.H. 883, 395 A.2d 517 (1978); Cincinnati v. Hawkins, 67 Ohio Misc. 2d 4, 643 N.E.2d 1184 (Mun. Ct. 1993); Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 9 A.L.R.2d 712 (1949); City of Stevens Point v. Bocksenbaum, 225 Wis. 373, 274 N.W. 505 (1937).

3 Vaden v. Village of Maywood, Ill., 809 F.2d 361 (7th Cir. 1987); Jones v. City of Moultrie, 196 Ga. 526, 27 S.E.2d 39 (1943); Com. v. Gulden, 369 Mass. 965, 341 N.E.2d 262 (1976).

4 People v. Kuc, 272 N.Y. 72, 4 N.E.2d 939, 107 A.L.R. 1272 (1936); Frecker v. City of Dayton, 153 Ohio St. 14, 41 Ohio Op. 109, 90 N.E.2d 851 (1950).
A city ordinance, restricting the sale of merchandise, except newspapers, on a public way within 1,000 feet of a sports stadium, was not void for vagueness, since, although the ordinance did not define "newspaper," the word has a readily ascertainable meaning; however, it was not narrowly tailored to achieve the city's legitimate interest in protecting citizens and ensuring the safety of the streets and sidewalks, where a peddler selling books did not interfere with pedestrian traffic, and the ordinance permitted other categories of activity, such as street performances, leafleting, and charitable solicitation. Weinberg v. City of Chicago, 310 F.3d 1029 (7th Cir. 2002).

5 Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613 (5th Cir. 2007).

6 Plummer v. Village of Swanton, 133 Ohio St. 623, 11 Ohio Op. 343, 15 N.E.2d 349 (1938).

7 City of Buffalo v. Schleifer, 2 Misc. 216, 21 N.Y.S. 913 (Super. Ct. 1893); Hindin v. Samuel, 158 Pa. Super. 539, 45 A.2d 370 (1946).

8 Territory of Hawaii v. Scruggs, 43 Haw. 71, 1958 WL 9949 (1958); City of Chicago v. Rhine, 363 Ill. 619, 2 N.E.2d 905, 105 A.L.R. 1045 (1936); People v. Kuc, 272 N.Y. 72, 4 N.E.2d 939, 107 A.L.R. 1272 (1936); Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 9 A.L.R.2d 712 (1949).

9 Am. Jur. 2d, Advertising §§ 8, 9.

10 City of Blue Island v. Kozul, 379 Ill. 511, 41 N.E.2d 515 (1942).
As to use of the streets for religious purposes, see § 204.
As to First Amendment concerns related to use of the streets and other public places for religious activity, see Am. Jur. 2d, Constitutional Law § 451.

11 Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 9 A.L.R.2d 712 (1949).

[12] Scott v. City of Pittsburgh, 903 A.2d 110 (Pa. Commw. Ct. 2006) (further holding that the hot dog vendor was not entitled to an evidentiary hearing under a local government agency law, since the vendor did not have a property right to operate a vending cart in his customary location).

[13] Scott v. City of Pittsburgh, 903 A.2d 110 (Pa. Commw. Ct. 2006).

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6. Subsurface or Overhead Uses

a. In General

§ 214. Subsurface or overhead uses of highways, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(1), 703(1)

An easement for public highway purposes creates both surface and subsurface property rights.[1] Subject to constitutional limitations[2] and the rights of abutting owners,[3] the public may use or authorize the use of space above and below a public highway for any public purpose that is incidental to the primary use of the way for travel, or which is otherwise beneficial to the public, and which does not materially interfere with the common right of travel by ordinary means.[4] Subject to the same limitations and restrictions, the public authority may also permit the use of subsurface or overhead space by abutting owners for private purposes in connection with the use and enjoyment of their premises.[5] The municipality's authority with regard to the subsurface and overhead use of streets, where it owns the fee in its streets, is not subject to limitation, except that its exercise must be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated.[6] A street or highway easement carries with it the right to construct such reasonable facilities as might be needed to carry public utility service to inhabitants of municipalities, and the construction of high voltage electric lines on such an easement is not such an additional servitude as will entitle an abutting landowner to additional compensation.[7]

Footnotes

1 State ex rel. E. Ohio Gas Co. v. Bd. of Cty. Comm. of Stark Cty., 2012-Ohio-4533, 980 N.E.2d 1056 (Ohio Ct. App. 5th Dist. Stark County 2012).
Generally, a roadway easement includes any subsurface rights incident to use of the surface. City of Chandler v. Arizona Dept. of Transp., 224 Ariz. 400, 231 P.3d 932 (Ct. App. Div. 1 2010).
Installation of sewer lines under town highway that traversed landowner's property, without landowner's permission, was authorized "as a necessary use of the highway and for highway purposes." Red House Farm, Inc. v. Lad

Enterprises, LLC, 122 A.D.3d 972, 995 N.Y.S.2d 824 (3d Dep't 2014).

[2] §§ 182, 183.

[3] §§ 130 to 134.

[4] State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).
As to granting franchises to use the street in that manner, see §§ 171 to 187.
As to the use of the subsurface of streets for transportation facilities, see § 225.

[5] People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915); Townsend v. Epstein, 93 Md. 537, 49 A. 629 (1901) (tunnel connecting factory buildings); Lanham v. Forney, 196 Wash. 62, 81 P.2d 777 (1938).

[6] People ex rel. Mather v. Marshall Field & Co., 266 Ill. 609, 107 N.E. 864 (1915).

[7] Am. Jur. 2d, Eminent Domain § 161.

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6. Subsurface or Overhead Uses

a. In General

§ 215. Pipes and conduits

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(4)

In some jurisdictions, a public easement in a highway or street includes the right to lay pipes or conduits beneath the surface for the purpose of conveying water, gas, electric current, or other commodities for the benefit of the public.[1] Under this view, this use does not constitute an additional servitude entitling the owners of the fee to compensation.[2] However, the view has also been taken that such a use is not included within a highway easement.[3]

Generally, the right to excavate the highways or streets for the purpose of laying pipes or conduits requires the consent of the legislature or the municipality, given pursuant to legislative authority.[4] The right of a public utility company to excavate in a public highway or street in the exercise of a franchise is necessarily subject to reasonable municipal regulation, unless specifically excluded by the act conferring the right.[5] Such a regulation must be a reasonable exercise of the police power, and will be declared unconstitutional if it is an arbitrary interference with the rights of the public utility company.[6]

Footnotes

1 Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913) (overruled on other grounds by, City of Orange Beach v. Benjamin, 821 So. 2d 193 (Ala. 2001)); Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926); City of Bayonne v. Borough of North Arlington, 77 N.J. Eq. 166, 75 A. 558 (Ch. 1910), rev'd on other grounds, 78 N.J. Eq. 283, 79 A. 357 (Ct. Err. & App. 1911); State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947); Lynch v. Town of Northview, 73 W. Va. 609, 81 S.E. 833 (1914).

2 Am. Jur. 2d, Eminent Domain § 164.

[3] Heyert v. Orange & Rockland Utilities, Inc., 17 N.Y.2d 352, 271 N.Y.S.2d 201, 218 N.E.2d 263 (1966).
A county does not have the authority to grant a pipeline easement in the subsurface of a county road, which is on land owned in fee but subject to a prescriptive easement, for the exclusive private use of a nonowner, because any use of the subsurface that is not within the scope of the public interest is an infringement on the owner's rights; thus, the owner may maintain an action to compel the removal of the unauthorized pipeline and to secure injunctive relief. Hale County v. Davis, 572 S.W.2d 63 (Tex. Civ. App. Amarillo 1978), writ refused n.r.e., (Jan. 31, 1979).

[4] New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905); Lukrawka v. Spring Val. Water Co., 169 Cal. 318, 146 P. 640 (1915); People ex rel. Fitzhenry v. Union Gas & Elec. Co., 254 Ill. 395, 98 N.E. 768 (1912); State ex rel. Wood v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N.E. 674 (1901); Attorney General v. Haverhill Gaslight Co., 215 Mass. 394, 101 N.E. 1061 (1913); Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N.W. 628 (1908); Adams v. Samuel R. Bullock & Co., 94 Miss. 27, 47 So. 527 (1908); Elizabeth City v. Banks, 150 N.C. 407, 64 S.E. 189 (1909); Henry v. Bartlesville Gas & Oil Co., 1912 OK 569, 33 Okla. 473, 126 P. 725 (1912); City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960); West Tex. Utilities Co. v. City of Baird, 286 S.W.2d 185 (Tex. Civ. App. Eastland 1956), writ refused n.r.e.

[5] New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905); Iowa City v. Iowa City Light & Power Co., 90 F.2d 679, 112 A.L.R. 618 (C.C.A. 8th Cir. 1937); Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906); Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N.W. 628 (1908); Scranton Gas & Water Co. v. City of Scranton, 214 Pa. 586, 64 A. 84 (1906); City of Paris v. Paris-Henry County Public Utility Dist., 207 Tenn. 388, 340 S.W.2d 885 (1960).

[6] Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S. Ct. 18, 49 L. Ed. 169 (1904); City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 39 N.E. 433 (1895).

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6. Subsurface or Overhead Uses

a. In General

§ 216. Bridges and passageways over street

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(8)

A.L.R. Library

Municipality's power to permit private owner to construct building or structure overhanging or crossing the air space above public street or sidewalk, 76 A.L.R.2d 896

A municipality may, by a revocable license, authorize the construction and maintenance of a private bridge or passageway over a street, if it does not interfere with travel in the street or with the rights of adjoining owners, and it appears that it will promote the public convenience by reducing the amount of traffic on the street.[1] A bridge over a public street connecting the buildings of an educational institution, which will add to the architectural beauty of the municipality and enlarge the usefulness of the institution to the community, is a quasi-public use.[2]

Footnotes

1 Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926); Kellogg v. Cincinnati Traction Co., 80 Ohio St. 331, 88 N.E. 882 (1909); Hotel Wisconsin Realty Co. v. Phillip Gross Realty Co., 184 Wis. 388, 198 N.W. 761 (1924).

2 Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667 (1926).

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b. Transmission Lines

§ 217. Right to use right-of-way

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(5)

In some jurisdictions, the installation of poles and wires in a highway easement is a proper use,[1] and does not constitute an additional servitude for which the fee owners need be compensated.[2] In other jurisdictions, the use of a highway for transmission poles and wires is not included within the public easement of passage.[3] The more prevalent view is that the erection of electric lines in a highway or street for the purpose of lighting is included within a public highway easement, since it is a use that appertains directly or indirectly to the right of passage and tends to preserve or make more easy the exercise of that right.[4]

The term "existing utilities," within the meaning of an ordinance vacating a public alley but retaining exclusive rights to existing utilities, was not limited to physical infrastructure already in place, but also included statutory rights to construct and maintain telephone poles, wires, and other fixtures.[5]

Footnotes

1 Crawford v. Alabama Power Co., 221 Ala. 236, 128 So. 454 (1930); Nerbonne, N.V. v. Florida Power Corp., 692 So. 2d 928 (Fla. 5th DCA 1997); State v. Weber, 88 Kan. 175, 127 P. 536 (1912); New York Cent. & H.R.R. Co. v. Central Massachusetts Elec. Co., 219 Mass. 85, 106 N.E. 566 (1914); Hall v. Lea County Elec. Co-op., 1968-NMSC-040, 78 N.M. 792, 438 P.2d 632 (1968); Petition of Grand River Dam Authority, 1971 OK 48, 484 P.2d 505 (Okla. 1971); Johnson v. City of Chattanooga, 183 Tenn. 123, 191 S.W.2d 175 (1945); State ex rel. York v. Board of Com'rs of Walla Walla County, 28 Wash. 2d 891, 184 P.2d 577, 172 A.L.R. 1001 (1947).
As to lines constituting an obstruction or nuisance, see § 243.
As to the right of an electric utility to use the streets, generally, see Am. Jur. 2d, Energy and Power Sources § 163.

[2] Am. Jur. 2d, Eminent Domain § 161.

[3] Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906 (1911); Louisiana Power & Light Co. v. Dileo, 79 So. 2d 150 (La. Ct. App. 1st Cir. 1955); Berry v. Southern Pine Elec. Power Ass'n, 222 Miss. 260, 76 So. 2d 212, 58 A.L.R.2d 508 (1954); Heyert v. Orange & Rockland Utilities, Inc., 17 N.Y.2d 352, 271 N.Y.S.2d 201, 218 N.E.2d 263 (1966); Brown v. Asheville Elec. Light Co., 138 N.C. 533, 51 S.E. 62 (1905).

[4] Brandt v. Spokane & I.E.R. Co., 78 Wash. 214, 138 P. 871 (1914).

[5] Holmes v. Sprint United Telephone of Kansas, 29 Kan. App. 2d 1019, 35 P.3d 928 (2001).

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6. Subsurface or Overhead Uses

b. Transmission Lines

§ 218. Power to authorize or regulate

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(5)

A state has the power to authorize the use of highway rights-of-way for the construction and operation of transmission lines,[1] subject to any right of abutting owners to compensation,[2] and in many states, by express statutes, public utility companies have been empowered to make that use of the public highways and streets.[3] Under some statutes, the grantee is not required to obtain the consent of any state agency to make the grant binding, but all that is required is that the grant be accepted.[4] Statutes may regulate the use of highways by public utility companies with regard to installing poles, wires, and other appliances, such as by requiring that the wires be a certain height above the street[5] or be so located as not to interfere with the safety and convenience of ordinary travel over the streets or highways.[6]

Permission given to a state, pursuant to a federal statute,[7] to establish a highway over allotted Indian land includes the right to grant a revocable license to maintain rural electric service lines within the highway bounds.[8]

Where municipal consent to the occupation of its streets by public service companies is required, the municipality may qualify its consent to the construction and maintenance of transmission lines by reasonable conditions, provided they do not conflict with the rights given to the companies by statute.[9] A local government's power to regulate the use of municipal public ways by utilities when that use is for the purpose of delivering telecommunications services within the municipality extends only to enacting reasonable, nondiscriminatory conditions for the use of the public ways, and does not extend to prohibiting their use altogether, except perhaps where saturation has occurred.[10]

Footnotes

[1] Berry v. Southern Pine Elec. Power Ass'n, 222 Miss. 260, 76 So. 2d 212, 58 A.L.R.2d 508 (1954).

[2] Am. Jur. 2d, Eminent Domain § 161.

[3] City of Pomona v. Sunset Tel. & Tel. Co., 224 U.S. 330, 32 S. Ct. 477, 56 L. Ed. 788 (1912); Town of New Decatur v. American Tel. & Tel. Co., 176 Ala. 492, 58 So. 613 (1912); State ex rel. Shaver v. Iowa Telephone Co., 175 Iowa 607, 154 N.W. 678 (1915); Kibbie Telephone Co. v. Landphere, 151 Mich. 309, 115 N.W. 244 (1908); Northwestern Telephone Exchange Co. v. City of Minneapolis, 81 Minn. 140, 83 N.W. 527 (1900), aff'd, 81 Minn. 140, 86 N.W. 69 (1901); Village of Carthage v. Central New York Tel. & Tel. Co., 185 N.Y. 448, 78 N.E. 165 (1906); City of Zanesville v. Zanesville Tel. & Tel. Co., 64 Ohio St. 67, 59 N.E. 781 (1901); Zimmerman v. American Tel. & Tel. Co., 71 S.C. 528, 51 S.E. 243 (1904); Kirby v. Citizens' Telephone Co. of Sioux Falls, 17 S.D. 362, 97 N.W. 3 (1903); Ft. Worth & R.G. Ry. Co. v. Southwestern Tel. & Tel. Co., 96 Tex. 160, 71 S.W. 270 (1903); City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944).

[4] City of Seattle v. Western Union Telegraph Co., 21 Wash. 2d 838, 153 P.2d 859 (1944).

[5] Weaver v. Dawson County Mut. Tel. Co., 82 Neb. 696, 118 N.W. 650 (1908).

[6] Interstate Power Co. v. Thomas, 51 F.2d 964, 84 A.L.R. 681 (C.C.A. 8th Cir. 1931).

[7] 25 U.S.C.A. § 311, discussed in Am. Jur. 2d, Indians; Native Americans § 80.

[8] U.S. v. Oklahoma Gas & Elec. Co., 318 U.S. 206, 63 S. Ct. 534, 87 L. Ed. 716 (1943).

[9] Charles Simon's Sons Co. v. Maryland Tel. & Tel. Co., 99 Md. 141, 57 A. 193 (1904); Postal Telegraph Cable Co. v. City of Chicopee, 207 Mass. 341, 93 N.E. 927 (1911).
As to conditions in franchises allowing use of the streets, generally, see §§ 177 to 181.

[10] Dublin v. State, 118 Ohio Misc. 2d 18, 2002-Ohio-2431, 769 N.E.2d 436 (C.P. 2002).

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6. Subsurface or Overhead Uses

b. Transmission Lines

§ 219. Along streets

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(5)

A municipality may make reasonable regulations concerning the location, use, and maintenance of lines along the streets, and may require reasonable safeguards in that respect.[1] The municipality may designate a part of its streets for this use, on such terms and conditions as it may reasonably impose.[2] Moreover, the municipality may make proper and reasonable provision for inspection or supervision of those lines.[3]

Since the maintenance of overhead, live electric wires is extremely dangerous, they may be prohibited by municipal ordinance,[4] except where a statute has granted the right to maintain wires along highways and streets.[5] In any case, municipal authorities may prohibit the erection of poles and the stringing of wires in places and in a manner that would injure or inconvenience the public.[6]

A municipal or quasi-municipal corporation with the power to provide for the lighting of its streets or other highways[7] may place poles and wires along them for that purpose, and may itself exercise this right, either directly or indirectly by contract with a private entity.[8]

A municipal ordinance granting the right to place and maintain poles and wires of a public utility company along a street is not a mere license, but is a grant of a property right that is assignable, taxable, and alienable.[9]

Footnotes

[1] Western Union Tel. Co. v. City of Richmond, 224 U.S. 160, 32 S. Ct. 449, 56 L. Ed. 710 (1912); City of Vandalia v. Postal Tel.-Cable Co., 274 Ill. 173, 113 N.E. 65 (1916); State ex rel. Shaver v. Iowa Telephone Co., 175 Iowa 607,

154 N.W. 678 (1915); Moren v. New Orleans Ry. & Light Co., 125 La. 944, 52 So. 106 (1910); Postal Telegraph Cable Co. v. City of Chicopee, 207 Mass. 341, 93 N.E. 927 (1911); Village of Jonesville v. Southern Michigan Tel. Co., 155 Mich. 86, 118 N.W. 736 (1908); Northwestern Telephone Exchange Co. v. City of Minneapolis, 81 Minn. 140, 83 N.W. 527 (1900), aff'd, 81 Minn. 140, 86 N.W. 69 (1901); Village of Carthage v. Central New York Tel. & Tel. Co., 185 N.Y. 448, 78 N.E. 165 (1906); Mitchell v. Raleigh Electric Co., 129 N.C. 166, 39 S.E. 801 (1901); City of Salem v. Anson, 40 Or. 339, 67 P. 190 (1902); Duquesne Light Co. v. City of Pittsburgh, 251 Pa. 557, 97 A. 85 (1916); Kirby v. Citizens' Telephone Co. of Sioux Falls, 17 S.D. 362, 97 N.W. 3 (1903).

[2] South Georgia Power Co. v. Smith, 42 Ga. App. 100, 155 S.E. 80 (1930); Boyd v. Portland Gen. Electric Co., 37 Or. 567, 62 P. 378 (1900); Karcher v. Wheeling Electrical Co., 94 W. Va. 278, 118 S.E. 154, 30 A.L.R. 1044 (1923).

[3] Delaware & Atlantic Telegraph & Telephone Co.'s Petition, 224 Pa. 55, 73 A. 175 (1909).

[4] Duquesne Light Co. v. City of Pittsburgh, 251 Pa. 557, 97 A. 85 (1916).
As to ordinances requiring that the wires be placed in underground conduits, see § 221.

[5] Missouri Pac. Ry. Co. v. Sproul, 99 Kan. 608, 162 P. 293 (1917).

[6] Village of Jonesville v. Southern Michigan Tel. Co., 155 Mich. 86, 118 N.W. 736 (1908).

[7] § 67.

[8] Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906 (1911); French v. Robb, 67 N.J.L. 260, 51 A. 509 (N.J. Ct. Err. & App. 1902).

[9] City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 33 S. Ct. 988, 57 L. Ed. 1389 (1913); City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U.S. 649, 32 S. Ct. 572, 56 L. Ed. 934 (1912).

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6. Subsurface or Overhead Uses

b. Transmission Lines

§ 220. Across highways and streets

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(5)

The right of public utility companies to maintain overhead wires across streets and highways is largely controlled by statute, and the particular statutes conferring those rights frequently contain conditions, such as a requirement that the wires must be placed at a certain height.[1] Statutes that forbid placing wires along or upon highways and public roads without permission are violated by placing them across the roads.[2] In the absence of permission, an individual does not have the right to stretch power wires across a street to connect with lines of an electric company.[3]

Footnotes

1 Weaver v. Dawson County Mut. Tel. Co., 82 Neb. 696, 118 N.W. 650 (1908).

2 Mt. Vernon Tel. Co. v. Franklin Farmers' Co-op. Tel. Co., 113 Me. 46, 92 A. 934 (1915).

3 Incorporated Town of Ackley v. Central States Electric Co., 204 Iowa 1246, 214 N.W. 879, 54 A.L.R. 474 (1927).

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b. Transmission Lines

§ 221. Compelling placement of wires in underground conduits

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(5)

A state or a municipality may compel public utility companies to place their wires in service conduits, if the use of the streets for overhead wires is injurious to public safety, convenience, comfort, or utility.[1] The power of the municipality to order that the wires of a company—which received its right, directly from the state, to erect its poles—be placed in underground conduits must rest on express legislation containing a clear and unqualified grant of that power.[2] The power to require that wires be placed underground may not be exercised arbitrarily.[3]

Footnotes

1 Western Union Tel. Co. v. City of Richmond, 224 U.S. 160, 32 S. Ct. 449, 56 L. Ed. 710 (1912); Northwestern Telephone Exchange Co. v. City of Minneapolis, 81 Minn. 140, 83 N.W. 527 (1900), aff'd, 81 Minn. 140, 86 N.W. 69 (1901); Duquesne Light Co. v. City of Pittsburgh, 251 Pa. 557, 97 A. 85 (1916).

2 Village of Carthage v. Central New York Tel. & Tel. Co., 185 N.Y. 448, 78 N.E. 165 (1906).

3 Northwestern Telephone Exchange Co. v. City of Minneapolis, 81 Minn. 140, 83 N.W. 527 (1900), aff'd, 81 Minn. 140, 86 N.W. 69 (1901); City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N.W. 588 (1908).

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6. Subsurface or Overhead Uses

b. Transmission Lines

§ 222. Private transmission lines

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(5)

A county that only has an easement in land devoted to highway purposes may not authorize the construction of a private transmission line along the highway.[1] Thus, at the instance of the owner of the fee, a company that is not chartered to construct or maintain transmission lines may be enjoined from erecting a telephone line for its private use in a public right-of-way over which the county owned an easement.[2]

Footnotes

1 Benton v. Yarborough, 128 S.C. 481, 123 S.E. 204, 34 A.L.R. 402 (1924).

2 Acme Cement Plaster Co. v. American Cement Plaster Co., 167 S.W. 183 (Tex. Civ. App. Amarillo 1914).

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7. Transportation Facilities and Operations

§ 223. Use of highways for transportation facilities and operation, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Automobiles 58

West's Key Number Digest, Highways 167

West's Key Number Digest, Municipal Corporations 703(1)

The use of highways and streets as a facility for commercial transportation of freight or passengers by the ordinary means is incidental to and consistent with the primary purpose of their establishment, and is therefore, in the absence of any restrictive regulation, a proper use.[1] Such use is not, however, one that may be exercised as of right, but is a special or permissive use, which may be prohibited, restricted, or conditioned by the controlling public authority.[2] This rule applies to private contract carriers[3] as well as to common carriers.[4]

The fact that the state legislative authority may, under its police power restrict, limit, or prohibit the use of highways for the transportation of persons or property for hire does not necessarily mean that each political subdivision of the state has that right.[5] Rather, political subdivisions have only such power in this regard as is delegated to them by the state legislature, either expressly or by necessary implication.[6]

The business of leasing vehicles to be driven by the lessee on the highway is a use of the highway for gain by the lessor, and not a use as a member of the public in the ordinary manner, and, for that reason, a city has the same power to regulate automobile rental businesses as it does private carriers.[7]

A right-of-way for public transportation uses, initially defined in terms of a specific form of public transport, may, under proper circumstances, be taken to include other mechanical methods of public transportation, so long as the change is consistent with the grantor's purpose and general intention.[8]

Footnotes

[1] Adams v. Burke, 308 Ky. 722, 215 S.W.2d 531 (1948); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915); Park Hotel Co. v. Ketchum, 184 Wis. 182, 199 N.W. 219, 33 A.L.R. 351 (1924).

[2] Stephenson v. Binford, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352, 52 S. Ct. 595, 76 L. Ed. 1155, 81 A.L.R. 1402 (1932); Mayor & Aldermen of Savannah v. Knight, 172 Ga. 371, 157 S.E. 309, 73 A.L.R. 1289 (1931); Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200, 169 N.E. 22, 66 A.L.R. 834 (1929); Dresser v. City of Wichita, 96 Kan. 820, 153 P. 1194 (1915); Ray v. City of Owensboro, 415 S.W.2d 77 (Ky. 1967); City of New Orleans v. Calamari, 150 La. 737, 91 So. 172, 22 A.L.R. 106 (1922); Rutledge Co-op. Ass'n v. Baughman, 153 Md. 297, 138 A. 29, 56 A.L.R. 1042 (1927); Atlantic Greyhound Corp. v. North Carolina Utilities Commission, 229 N.C. 31, 47 S.E.2d 473 (1948); Collins-Dietz-Morris Co. v. State Corp. Com'n, 1931 OK 301, 154 Okla. 121, 7 P.2d 123, 80 A.L.R. 561 (1931); Puget Sound Traction, Light & Power Co. v. Grassmeyer, 102 Wash. 482, 173 P. 504 (1918); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).
A statute that forbids only the conduct of the business of transporting passengers for hire by vehicle and receiving and discharging passengers until certain regulations are followed does not invade a constitutional right to a physical use of the highway. Haselton v. Interstate Stage Lines, 82 N.H. 327, 133 A. 451, 47 A.L.R. 218 (1926).

[3] Hicklin v. Coney, 290 U.S. 169, 54 S. Ct. 142, 78 L. Ed. 247 (1933); Stephenson v. Binford, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932).
As to private or contract motor carrier permits, see Am. Jur. 2d, Carriers §§ 130 to 132.

[4] Mayor & Aldermen of Savannah v. Knight, 172 Ga. 371, 157 S.E. 309, 73 A.L.R. 1289 (1931); Hadfield v. Lundin, 98 Wash. 657, 168 P. 516 (1917); Ex parte Dickey, 76 W. Va. 576, 85 S.E. 781 (1915).
As to the issuance to common carriers of certificates of convenience and necessity, see Am. Jur. 2d, Carriers §§ 112 to 129.

[5] Adams v. Burke, 308 Ky. 722, 215 S.W.2d 531 (1948).

[6] Adams v. Burke, 308 Ky. 722, 215 S.W.2d 531 (1948).

[7] Hodge Drive-It-Yourself Co. v. City of Cincinnati, 123 Ohio St. 284, 9 Ohio L. Abs. 283, 175 N.E. 196, 77 A.L.R. 889 (1931), aff'd, 284 U.S. 335, 52 S. Ct. 144, 76 L. Ed. 323 (1932).

[8] Toews v. U.S., 376 F.3d 1371 (Fed. Cir. 2004) (applying California law).

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7. Transportation Facilities and Operations

§ 224. Surface transportation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Automobiles 58

West's Key Number Digest, Municipal Corporations 680(7), 703(1)

A transportation company does not have the right to use the streets of a municipality without express authority from some legislative body, or the authorities of the municipal government.[1] The state is the ultimate source of all powers and privileges that a transportation company may acquire to use the streets of a municipality.[2] The state may, either in the act creating a corporation or by a special grant, confer a franchise to use the streets and highways for commercial transportation purposes.[3]

The exercise of the power to authorize the use of streets for commercial transportation purposes need not be by direct legislative action; rather, municipalities are generally empowered to authorize or forbid such use of their streets[4] and to regulate and control the manner in which the right is exercised.[5] A municipality has this power only when properly delegated to it by the state.[6] Further, as a result of federal laws applicable to motor carriers,[7] a motor carrier from outside the state is entitled to the same use of a city's streets as one licensed by the city.[8]

The operation of a railroad or the like on a public street is not consistent with the ordinary exercise of the highway easement.[9]

A city ordinance prohibiting the use of amphibious vehicles as tour service vehicles on roads in a historic district served a legitimate public purpose, by regulating the use of heavily traveled city streets by a certain type of vehicle, and even assuming that a public service commission's authority to issue certificates of public convenience and necessity covered the same subject as the ordinance, the ordinance was saved by a state law authorizing local governments to exercise their police powers and enact local laws to control public roads, so as to prohibit the use of heavily traveled streets by any class or kind of traffic incompatible with the normal and safe movement of traffic.[10] A local law prohibiting commuter vans from traveling on certain routes or picking up and depositing passengers except at their homes or away from bus stops was also rationally related to the city's police power to regulate traffic in the general public interest.[11]

Footnotes

[1] Edmonds v. Baltimore & P.R. Co., 114 U.S. 453, 5 S. Ct. 1098, 29 L. Ed. 216 (1885); Bangor Tp. v. Bay City Traction & Elec. Co., 147 Mich. 165, 110 N.W. 490 (1907).

[2] State v. Parsons Street Ry. & Electrical Co., 81 Kan. 430, 105 P. 704 (1909); Bentler v. Cincinnati, C. & E. Ry. Co., 180 Ky. 497, 203 S.W. 199 (1918).

[3] State v. Des Moines City Ry. Co., 159 Iowa 259, 140 N.W. 437 (1913).

[4] § 223.

[5] Georgia Power Co. v. City of Decatur, 281 U.S. 505, 50 S. Ct. 369, 74 L. Ed. 999 (1930); Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, 249 U.S. 399, 39 S. Ct. 349, 63 L. Ed. 669, 6 A.L.R. 1648 (1919); Little Rock Ry. & Elec. Co. v. Dowell, 101 Ark. 223, 142 S.W. 165 (1911); Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 149 Ga. 1, 98 S.E. 696, 5 A.L.R. 1 (1919); City of Chicago v. O'Connell, 278 Ill. 591, 116 N.E. 210, 8 A.L.R. 916 (1917); Village of Grandville v. Grand Rapids, H. & C.R.R., 225 Mich. 587, 196 N.W. 351, 34 A.L.R. 1408 (1923); City of St. Paul v. Great Northern Ry. Co., 138 Minn. 25, 163 N.W. 788 (1917); Gress v. Village of Ft. Loramie, 100 Ohio St. 35, 125 N.E. 112, 8 A.L.R. 242 (1919); City of Portsmouth v. Virginia Railway & Power Co., 141 Va. 54, 126 S.E. 362, 39 A.L.R. 1510 (1925); State v. Seattle & R. V. Ry. Co., 113 Wash. 684, 194 P. 820, 15 A.L.R. 1194 (1921).

[6] City of Baltimore v. United Rys. & Elec. Co. of Baltimore, 107 Md. 250, 68 A. 557 (1908).

[7] Am. Jur. 2d, Carriers §§ 83 to 102.

[8] Automobile Club of New York, Inc. v. Dykstra, 423 F. Supp. 2d 279 (S.D. N.Y. 2006), aff'd, 520 F.3d 210 (2d Cir. 2008) (tow trucks).

[9] Knapp & Cowles Mfg. Co. v. New York, N.H. & H.R. Co., 76 Conn. 311, 56 A. 512 (1903); Seaboard Air Line Ry. v. Southern Inv. Co., 53 Fla. 832, 44 So. 351 (1907).

[10] Old South Duck Tours v. Mayor & Aldermen of City of Savannah, 272 Ga. 869, 535 S.E.2d 751 (2000) (also rejecting an equal protection challenge).

[11] Ricketts v. City of New York, 181 Misc. 2d 838, 688 N.Y.S.2d 418 (Sup 1999).

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7. Transportation Facilities and Operations

§ 225. Subways

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(7), 703(1)

A public authority may authorize the use of the streets of a municipality for the operation of a subway.[1] Generally, the use of a public street for this purpose is within the general purposes for which the street was originally dedicated or acquired,[2] and does not constitute an additional burden or servitude for which abutting owners need be compensated.[3] A subway system merely amounts to an addition to the streets, which increases their capacity to serve public needs for transportation.[4]

Footnotes

1 Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777 (1952); State v. Parsons Street Ry. & Electrical Co., 81 Kan. 430, 105 P. 704 (1909); Peabody v. City of Boston, 220 Mass. 376, 107 N.E. 952 (1915); In re Board of Rapid Transit R. Com'rs of City of New York, 197 N.Y. 81, 90 N.E. 456 (1909).

2 Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777 (1952); Sears v. Crocker, 184 Mass. 586, 69 N.E. 327 (1904).

3 Am. Jur. 2d, Eminent Domain § 165.

4 Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777 (1952).

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7. Transportation Facilities and Operations

§ 226. Elevated railways

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Municipal Corporations 680(7), 703(1)

Some courts hold that an elevated railway is not a proper street use.[1] Other courts, however, do not regard the use of public streets for an elevated railway, when properly authorized, as subjecting the street to a new servitude or an unlawful use, based on not finding a distinction between elevated and surface railways, and holding that when properly constructed, an elevated railway may obstruct the street less, and be less hazardous to the public, than a surface one.[2]

Footnotes

1 Rourke v. Holmes St. Ry. Co., 221 Mo. 46, 119 S.W. 1094 (1909).

2 Barsaloux v. City of Chicago, 245 Ill. 598, 92 N.E. 525 (1910).

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